TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 319.

WILLIAM HENDRIX, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED SEPTEMBER 10, 1909.

(21,814.)

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a *(Præcipe of Attorney for Plaintiff in Error.)*

In re WILL HENDRIX
vs.
UNITED STATES.

On Writ of Error Pending in the Spreme Court of the United States, at Washington, D. C.

To the Clerk of the United States District Court for the Eastern District of Texas, at Paris.

DEAR SIR: You will please copy in the record of the transcript of the above entitled cause,

1st. The transcript of the records of the Court at Pauls valley, Indian Territory, and the bill of indictment.

2nd. The Bill of exception to over-ruling motion to transfer the case back to the District Court of Garvin County, Oklahoma, and affidavit of R. McMillan, attached.

3rd. Record of impaneling a jury, Plea of not Guilty, etc.

4th. Bill of exception to refusal of Court to allow wife to testify.

5th. Finding of jury, Motion for new trial and affidavits of jurors.

6th. Assignment of errors.

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E. W. FAGAN,
Attorney for Will Hendrix, Def't.

(Endorsed:) 2087. United States vs. Will Hendrix. Plaintiff's in error præcipe for transcript. Filed May 16th, 1909. A. O. Brackett, Clerk.)

1 *Caption.*

Be it remembered, That at a Regular Term of the Honorable District Court of the United States, for the Eastern District of Texas, begun and holden at Paris, Texas, on Monday, the first day of March, A. D. 1909, at which the Honorable David E. Bryant, United States District Judge, presided, there came on for trial on May 4th, A. D. 1909, Cause No. 2087, on the Criminal Docket of said Court, and styled, The United States of America vs. Will Hendrix, in which cause the defendant is charged in the indictment therein, with the crime of murder committed in the Indian Territory, and the trial continuing from day to day until May 6th, A. D. 1909, on said last named date, a verdict of guilty in manner and form as charged in the indictment was rendered against the defendant, and the following are the proceedings and determinations in said cause.

2 *Transcript from United States Court in Southern District of Indian Territory, at Pauls Valley.*

In the United States Court in the Indian Territory, Within and for the Southern District Thereof, at Pauls Valley.

No. 1934.

UNITED STATES
vs.
WILLIAM HENDRIX, J. W. DARROUGH, and J. L. HEARD.

Transcript of Record.

Transcript from Indian Territory.

UNITED STATES OF AMERICA,
Southern District Indian Territory, ss:

On this, the 21st day of May, A. D. 1906, the United States Court for the Southern District of the Indian Territory met in regular session in the United States Court Room in the City of Pauls Valley, I. T.

Present and presiding, as follows, to wit:

The Honorable J. T. Dickerson, United States Judge.
" C. M. Campbell, United States Clerk.
" S. H. Wooten, Deputy U. S. Clerk.
" G. A. Porter, United States Marshal.
" J. H. Letherman, Deputy U. S. Marshal.
" George R. Walker, U. S. Attorney.
" Alexander Gullet, Ass't U. S. Attorney.
Guy Sackett, Official Stenographer.

After Court was opened in due form, the following proceedings were had, to wit:

* * * * * * *

In re Organization of Grand Jury.

Comes now the United States Marshal and makes known to the Court that in obedience to an order of this Court he has summoned the persons drawn as Grand Jurors by the Jury Commissioners for the May, 1906 term of the United States Court at Pauls Valley.

That the following persons on the list were not found: Coleman Mosely, T. E. Snow, Claude See, and the following persons
3 were excused by the Court: A. P. Smith, C. D. Wimberly, Joe Kinney: that the following persons were duly summoned and appear- before the Court: (1) L. Baird, (2) W. E. Lokey, (3) Dave Hyden, (4) Field Tucker, (5) H. T. Williams, (6) J. E. Flynt, (7) A. C. Cromer, (8) D. G. Thomas, (9) William Allison, (10) J. E. Burford, (11) W. E. Leath, (12) M. Fraze, (13) T. B. Clements, (14) A. M. Davis, (15) H. K. Brumley, (16) Russ Run-

yan, and it appearing to the Court that the above named persons possess the necessary and requisite qualifications to serve as Grand Jurors and there being no objections offered to the said above named persons, they are thereupon duly qualified, sworn and designated as Grand Jurors for this, the May, 1906, term of this Court, and Dave Hyden, one of the members of said Grand Jury is, by the Court, appointed Foreman.

* * * * * * *

2nd Day, May, 1906, Term.

TUESDAY, *May 22nd*, 1906.

On this day Court opened pursuant to adjournment, present and presiding, as on other days of this term. After Court was opened in due form of law, the following proceedings were had, to wit:

* * * * * * *

In re Grand Jury, Reorganized.

Now at this time it appearing to the Court that a vacancy of two exists in the requisite and necessary number of 16 good and lawful Grand Jurors, as required by law, the Court having heretofore excused L. Baird and W. E. Lokey; It is therefore ordered by the Court that the U. S. Marshal forthwith summon two good and lawful persons to fill said vacancy and to take the place of the said L. Baird and W. E. Lokey, as Grand Jurors. Thereupon comes the U. S. Marshal in open Court and makes known to the Court that he has, in obedience to the order of this Court, duly summoned J. M. Osborne and H. C. Gray to serve as Grand Jurors for the balance of this, the May 1906 Term of this Court, and it appearing to the Court that the said J. M. Osborne, and H. C. Gray possess the requisite and necessary qualifications as required by law to serve as Grand Jurors, and there being no objections offered to the said J. M.
4 Osborne and H. C. Gray and the necessary and requisite number of 16 good and lawful men being complete, to wit: (1) J. M. Osborne, (2) H. C. Gray, (3) Dave Hyden, (4) Field Tucker, (5) H. T. Williams, (6) J. E. Floyd, (7) A. C. Cromer, (8) D. G. Thomas, (9) William Allison, (10) J. F. Burford, (11) W. E. Leath, (12) M. Fraze, (13) T. B. Clements, (14) A. M. Davis, (15) H. K. Brumley, (16) Russ Runyan, and there being no objections offered to any of the above named persons, they were thereupon duly qual. sworn and designated as the Grand Jury. After which the said Grand Jury retire in charge of their sworn bailiff to resume their labors.

* * * * * * *

7th Day, May, 1906, Term.

MONDAY, *May 28th*, 1906.

Now on this day Court opened pursuant to adjournment, present and presiding as of other days. After Court being opened in due form of law, the following proceedings were had to wit:

* * * * * * *

In re Report of the Grand Jury.

Comes now the Grand Jury and all being present and in charge of their sworn bailiff and through their foreman, D. M. Hyden, Esq., submit the following report:

"We have found true bills in the following Commissioner's cases:

* * * * * * *

1934. Murder.

UNITED STATES
vs.
WM. HENDRIX et al.

* * * * * * *

We have found true bills in the following cases in which the defendant has been arrested.

* * * * * * *

We have found the following original true bills.

* * * * * * *

Which said indictments were ordered filed in open Court and in the presence of the Grand Jury and were by the Clerk, duly filed in open Court and in the presence of the Grand Jury.

5 It is further ordered that the proper process issue for all of the above named defendants who are not under bond for their appearance or in custody of the United States Marshal.

After which the Grand Jury retire in charge of their sworn bailiff to further resume their labors.

* * * * * * *

8th Day, May, 1906, Term.

TUESDAY, *May 29th*, 1906.

Now on this day Court opened pursuant to adjournment. Present and presiding as of other days. After Court being opened in due form of law, the following proceedings were had, to wit:

* * * * * * *

Certified Copy of Indictment Served on Defendant Wm. Hendrix.

Crim. 1934.

UNITED STATES
vs.
WM. HENDRIX et al.

Indictment for Murder.

UNITED STATES OF AMERICA,
Indian Territory, Southern District, ss:

In the United States Court in the Indian Territory, for the Southern District of Said Territory, at the May Term, A. D. 1906.

UNITED STATES
vs.
WILLIAM HENDRIX, J. W. DARROUGH, and J. L. HEARD, Defendants.

Copy of Indictment.

The Grand Jurors of the United States of America, duly elected impaneled, sworn and charged to enquire within and for the body of the Southern District of the Indian Territory, in the name and by the authority of the United States of America, upon their oaths do find, present and charge that one William Hendrix, on the fifteenth day of April, A. D. 1906, within the Southern District of the Indian Territory, with force and arms, in and upon the body of one Robert W. Voss, in the peace of the United States of America then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault: and that the said William Hendrix, a certain pistol, then and there charged with gunpowder and one leaden bullet, which said pistol, the said William Hendrix then and there had and held, then and there feloniously, wilfully and of his malice aforethought did discharge and shoot off, to, against and upon the said Robert W. Voss; and that the said William Hendrix with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said William Hendrix discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate and wound him the said Robert W. Voss in — upon the *the* front part of the top of head of him the said Robert W. Voss, giving to him the said Robert W. Voss, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and *and* shot out of the pistol aforesaid, by the said William Hendrix, in and upon the front part of the top of the head of him the said Robert W. Voss, one mortal wound; of which mortal wound, he the said Robert W. Voss then and there instantly died.

6 And the Jurors aforesaid do further present that J. W. Darrough

and J. L. Heard, in the said District and Territory aforesaid, before the said felony and murder was committed, in form aforesaid, to-wit on the 15th day of April A. D. 1906, with force and arms, in the District and Territory aforesaid, were accessories thereto before the fact, and did feloniously, and maliciously incite, move, procure, aid, counsel, hire, and command the said William Hendrix to do and commit the felony and murder, in manner and form aforesaid.

And so the Jurors aforesaid, upon their oaths aforesaid, do say, that the said William Hendrix, J. W. Darrough, and J. L. Heard, him, the said Robert W. Voss, in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

EUGENE HAMILTON,
Assistant United States Attorney, Southern District of Indian Territory.

7 (Endorsed:) #2087. Criminal Docket, No. 1934. In the United States Court, in the Indian Territory, Southern District. United States vs. *vs.* William Hendrix, J. W. Darrough, and J. L. Heard. Indictment for Murder. A True Bill. D. M. Hyden, Foreman of the Grand Jury. Filed in open Court, May 28th, 1906, in presence of the Grand Jury. C. M. Campbell, Clerk. By S. H. Wootton, Deputy. Filed June 3rd, 1906. A. O. Brackett, Clerk, by J. B. Dailey, Deputy. Witnesses for the United States. B. Wood, Ada. Pete Voss, Hart. Nancy Voss, Hart. Minnie Voss, Hart. Jim Hendrix, Hart. George Hall, Hart. David Lobaugh, Hart. Wm. Edwards, Hart. W. C. Rea, Hart. S. R. Boyd, Roff. R. C. Rolan, Roff. Nora Wilaei, Ada. Alexander Gullet, Tishimingo. Wm. Pheffer, Purcell. Rob. M. Cummins, Ada. Susie Bartlett, Hart. B. C. King, Ada. Charlie Brady, Ada. W. H. Key, Lebanon. A. Braeshears, Roff, I. T. Mrs. Roland, I. T. Harrison Nohio, Interpreter, Hugo, I. T. T. E. Brents, Muskogee, I. T. Miss Lillie Copeland, Ada. Hattie Wood, Hart. B. Wood, Ada. W. H. Brinlee, Ada. Maud Wood, Ada.

UNITED STATES OF AMERICA,
Indian Territory, Southern District, ss:

I, C. M. Campbell, Clerk of the United States Court in the Indian Territory, within and for the Southern District thereof, do hereby certify that the within and foregoing is a true and literal copy of the original indictment in the case of the United States versus William Hendrix, J. W. Darrough and J. L. Heard, No. 1934, on the docket of said Court at Pauls Valley, in said District and Territory, and now on file in my office at said Pauls Valley.

And I do further certify that on the 29th day of May, A. D. 1906, at 10 o'clock A. M. I delivered a true and literal copy of said indictment to the Defendant, William Hendrix, in the United States jail in the City of Pauls Valley, I. T.

In testimony whereof I have hereto set my hand and affixed the Seal of the Court this first day of June, A. D. 1906.

[SEAL.]

C. M. CAMPBELL,
U. S. Clerk,
By S. H. WOOTTON, *Deputy.*

8 *Order Removing to Paris.*

1934. Murder.

UNITED STATES
vs.
WM. HENDRIX et al.

Now on this day comes on to be heard, the motion of William Hendrix, herein, to have this cause transferred to the United States Court at Paris, Texas. The Court, being well advised in the presises doth grant said motion and directs the Clerk of this Court to transmit this cause, as to William Hendrix to the United States Court at Paris, Texas, together with the record and all papers herein, there to be docketed for such proceedings as may be legal and proper.

* * * * * * *

Criminal. 1934.

UNITED STATES
vs.
WILLIAM HENDRIX et al.

Transcript from Indian Territory.

Now on this day this cause came on to be heard upon motion of defendant William Hendrix, herein, to be released from the custody of the Marshal of this Court on bail. The Court, after hearing said motion, and being well and sufficiently advised in the Premises, doth overrule the same.

* * * * * * *

UNITED STATES OF AMERICA,
Indian Territory, Southern District, ss:

I, C. M. Campbell, Clerk of the United States Court in the Indian Territory, within and for the Southern District thereof, do hereby certify that the within and foregoing transcript of Record in the case of the United States versus William Hendrix et al., No. 1934, on the docket of said Court at Pauls Valley, in said District
9 and Territory, consisting of Pages 1, 2, 3, 4 and 5, is a true complete and literal copy of the proceedings had in said cause as the same appear of record in my office at Pauls Valley aforesaid.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 1st day of June, 1906.

[L. S.] C. M. CAMPBELL,
U. S. Clerk,
By S. H. WOOTTON, *Deputy.*

(Endorsed:) 1934. United States vs. William Hendrix, et al. Murder. Transcript of Record. Filed June 3rd, 1906. A. O. Brackett, Clerk, by J. B. Dailey, Deputy.

10 (*Motion to Transfer Cause to District Court of Garvin County, Oklahoma.*)

Murder. No. 2087.

UNITED STATES OF AMERICA
vs.
WILL HENDRIX.

Motion to Transfer to Indian Ter.

Now comes the defendant Will Hendrix, in the above entitled cause, and respectfully shows the Court that the Crime for which the defendant stands charged in this Court, to wit, the murder of Robert W. Voss, was committed near the town of Pauls Valley, and within the limits of what is now Garvin County, in the State of Oklahoma.

That said cause was transferred from the United States Court within and for the Indian Territory, to this Court before Oklahoma became a State. That under an Act of Congress known as the "Enabling Act", passed June 16th, 1906, all criminal cases pending in the United States Court, within and for the Indian Territory, were transferred to the District Courts of the State of Oklahoma, and of the County of said State where the alleged *a*ffense is said to have been committed.

Wherefore the Defendant prays that this cause be transferred to the District Court of Garvin County, in the State of Oklahoma, to end that cause may be tried in County and State where alleged to have been committed, in pursuance of the Constitution of the United States and the Statutes made in pursuance thereof.

PRUITT & McMILLAN,
E. M. FAGAN,
D. J. KENDALL,
Att's for Defendant.

In the United States Court for the Eastern District of Texas.

I, Robinson McMillan, on my oath do say, that I am now and have been since, previous to the committal of Will Hendrix on his first trial, one of his attorneys of record. That I was instrumental

in having the cause moved from Pauls Valley, Southern
11 District of the Indian Territory, to Paris, Texas, and that my reasons for so doing, were, among other things, but first and most important of all, the undue prejudice of the then presiding Judge of the Southern District of the Indian Territory, to wit; Judge J. T. Dickerson. That, under the Federal Statute, permitting said removal to be made, the same was done by Will Hendrix, on my advice and suggestion, especially for the reason above mentioned, because at the time, both he and I believed that he could not get a fair trial, owing to the prejudice of the said J. T. Dickerson, Judge. That the said J. T. Dickerson was outspoken in his opposition to said Will Hendrix, having talked to me myself, regarding said Hendrix, and made such declarations time and again, as caused me to believe that, though an honest man that he was, and as I believed him to be, that he could not, entertaining such convictions as he claimed to entertain, do justice to the said Will Hendrix in the trial of said cause.

Wherefore, this affidavit is made and filed herein in connection with the motion this day made that the venue be changed back to Pauls Valley, Oklahoma, where it properly belongs.

R. McMILLAN.

Subscribed and sworn to before me, this the 4th day of March A. D. 1909.

A. O. BRACKETT,
Clerk U. S. District Court, E. D. Texas.

(Endorsed:) No. 2087. U. S. vs. Will Hendrix. Motion to transfer to Garvin County Ok. Filed March 4th, 1909, A. O. Brackett, Clerk.

12 (*Arraignment and Plea.*)

In the District Court of the United States for the Eastern District of Texas.

Be it Remembered, That at a Regular Term of the District Court of the United States for the Eastern District of Texas, held in and for the District aforesaid, at the Court Room of said Court in the City of Paris, on Thursday, the 4th day of March, A. D. 1909.—Present the Honorable David E. Bryant, Judge, presiding—the following, among other proceedings were had.

(*Order Overruling Motion to Transfer Case to Oklahoma.*)

No. 2087.

THE UNITED STATES
vs.
WILL HENDRIX.

THURSDAY, *March 4th*, 1909.

The motion of defendant that this cause be remanded to Oklahoma, being considered by the Court, it is ordered that said motion

be overruled, to which action of the Court, the defendant, in open Court, excepted.

* * * * * * *

District Court.

No. 2087, Criminal Docket.

THE UNITED STATES
vs.
WILL HENDRIX.

This cause coming on to be heard, came the United States by her attorney and announced ready for trial, and the Defendant, Will Hendrix, in his own proper person, and by attorney appeared, and announced ready, and the said defendant, being arraigned, plead not guilty, and thereupon came a jury of twelve good and lawful men, to wit: L. R. Alexander, S. A. Patterson, R. B. Hagood, Virgil McCaslin, Austin Bishop, R. J. Acton, C. A. Wartes, G. A. Bell, W. S. Miller, J. R. West, W. C. Marchbanks, and J. M. Robinson, each and all of whom were severally face to face with the defendant and each and all examined, impaneled and sworn as required by law to try this cause, and the d-fendant being accorded the privilege of participating in the examination as to the competency and qualifications of each juror, and of peremptorily challenging not exceeding twenty from the list of jurors, all of whom had first been accepted by the Government and then tendered to the de-
13 fendant for acceptance or rejection, who having heard the plea of the defendant, when, after a portion of the evidence had been heard, and the conclusion of the trial not having been reached at the hour of adjournment, the further consideration of the cause was postponed until an evening session at seven o'clock, and not being concluded at the hour of adjournment of said evening session, was postponed until to-morrow morning at nine o'clock, the jury having been committed to the custody of the Marshal, in charge of a duly appointed and sworn bailiff, at the time of each postponement after being duly cautioned and instructed by the Court.

* * * * * * *

(*Judgment of Conviction.*)

In the District Court of the United States for the Eastern District of Texas.

Be it Remembered, That at a Regular Term of the District Court of the United States, for the Eastern District of Texas, held in and for the District aforesaid, at the Court Room of said Court in the City of Paris, on Saturday the 6th day of March A. D. 1909—present, the Honorable David E. Bryant, Judge Presiding—the following, among other proceedings, were had, to wit:

District Court.

No. 2087, Criminal Docket.

THE UNITED STATES
vs.
WILL HENDRIX.

This *day* coming on, further to be heard, came the United States by her Attorney, and the defendant, Will Hendrix in own proper person and by attorneys appeared and the said defendant, having been duly arraigned, and having plead not guilty on the day before yesterday, *and* thereupon came the jury of twelve good and lawful men, to wit: L. R. Alexander, S. A. Patterson, R. B. Hagood, Virgil McCaslin, Austin Bishop, R. J. Acton, G. A. Bell, W. S. Miller, J. R. West, W. C. Marchbanks, J. M. Robinson, and C. M. Wartes, who having been, on the day before yesterday, duly tried, impaneled and sworn, as required by law, and having heard the plea of the defendant on the day before yesterday, and on yesterday and on the day before yesterday, the evidence and the argument of
14 counsel in the presence of the defendant, and received the charge of the Court, on this day, retired to consider of their verdict, and on the same day brought into open court, the defendant being present in person and by attorney, their verdict in words and figures as follows, to-wit:

"We, the jury, duly impaneled and sworn in the above entitled action, do find from the law and the evidence the within named defendant, William Hendrix, guilty in manner and form as charged in the within indictment without capital punishment.

W. S. MILLER, *Foreman.*

It is therefore, considered by the Court, that the defendant William Hendrix is guilty of the murder of Robert W. Voss in the Indian Territory, as charged in the indictment and as found by the Jury, and it is ordered that he be remanded to the custody of the Marshal to await the judgment and sentence of the Court.

* * * * * * *

(*Judgment and Sentence.*)

In the District Court of the United States for the Eastern District of Texas.

Be it Remembered, That at a Regular Term of the District Court of the United States, for the Eastern District of Texas, begun and held in and for the District aforesaid, at the Court Rooms of said Court, in the City of Paris, on Monday, the 1st day of March, A. D. 1909—Present and Presiding, The Honorable David E. Bryant, Judge of the District Court of the United States, for the Eastern District of Texas—when the following, among other proceedings, were had:

District Court.

No. 2087, Criminal Docket.

THE UNITED STATES
vs.
WILLIAM HENDRIX.

TUESDAY, *March 9th*, A. D. 1909.

On motion of John B. Dailey, Esq., Ass't Attorney of the United States for the Eastern District of Texas, the above named defendant William Hendrix, was this day brought to the bar of the Court, in custody of the Marshal of said District, and being asked by the Court if he had anything to say why the judgment and sentence of the Court should not be pronounced against him, in accordance with the verdict of the jury rendered in this cause on the 6th day of March, 1909, and the law in such case made and provided, and no good cause being shown why the judgment and sentence of the Court should not be pronounced herein,

It is therefore considered by the Court that the defendant is guilty of the murder of Robert W. Voss, in the Indian Territory, as charged in the indictment and as found by the jury, and his punishment is fixed and assessed as follows, to wit:

That he be imprisoned at hard labor in the Penitentiary of the United States situated at Atlanta, in the State of Georgia, for the term and period of his natural life.

It is therefore ordered, adjudged and decreed by the Court, that the defendant be remanded to the custody of the Marshal, and he, by him, committed to the jail of Lamar County, forthwith, and, as soon as practicable, that he be, by the Marshal, conveyed to the United States Penitentiary designated above and there be delivered to the custody of the keeper of the said penitentiary, who will receive and safely keep the said William Hendrix imprisoned at hard labor in said Penitentiary, in execution of the sentence aforesaid and in conformity with the same for the full period of time aforesaid.

It is further ordered that the Clerk of this Court issue a mittimus to the Marshal of this District commanding the due execution of this decree.

And it is further ordered that the Clerk of this Court furnish the Marshal with a certified copy of this judgment, sentence and order, which shall be delivered to the keeper of said United States Penitentiary at Atlanta, Georgia.

This order is qualified by the order this day entered as to the custody of the said Will Hendrix.

16 (*Order Relating to Custody of Defendant Pending Determination of Appeal Proceeding.*)

Order.

In the District Court in and for the Eastern District of Texas.

No. 2087.

UNITED STATES
vs.
WILL HENDRIX.

Order as to Custody Pending Appeal.

MARCH 9TH, 1909.

This cause coming on further to be heard, in open court, this, the 9th day of March, 1909, upon the application of Will Hendrix, defendant, that he be allowed to remain in the jail at this place, Paris, Texas, until the perfection of his appeal, and the determination of this cause, *and* upon consideration the Court hereby allows and orders that the defendant, Will Hendrix, be kept in jail at this place, Paris, Texas, for the next sixty days; and that at the end of sixty days, if his said appeal be then perfected, then in that event, that he still remains in the same jail until the termination of the cause in the Supreme Court of the United States.

On the contrary, if said appeal shall *have* not have been perfected within the next sixty days, then in that event, the said Will Hendrix, be transferred to the Federal Prison at Atlanta, in the State of Georgia.

D. E. BRYANT, *Judge.*

17 (*Motion for New Trial.*)

In the United States District Court, Sitting at Paris, Texas.

UNITED STATES
vs.
WILL HENDRIX.

Motion.

Comes this defendant, Will Hendrix, and moves the Court to set aside the verdict rendered against him by a jury in the above mentioned cause, March 6, 1909, and to grant unto him a new trial and for the following causes and reasons:

1st. That the alleged offense of which he is accused was committed April 1906, at or near Pauls Valley, in the Southern District of the Indian Territory, and which has since become a State, and the territory and people therein are now in Garvin County, State of

Oklahoma; and that under the Constitution and organic law, this cause is triable in the vicinage in which it is alleged to have been committed.

2nd. That this cause having previously been removed from said vicinage to this Court at Paris, Texas, owing to the prejudice of the then presiding judge, Judge J. T. Dickerson, who held Court at Pauls Valley, Southern District Indian Territory, and the said J. T. Dickerson, being no longer judge in that jurisdiction, another judicial officer having succeeded him, the causes for said removal are no longer in existence, and the defendant was entitled to have his cause carried back to be tried in the District and County in which the offense is alleged to have been committed.

3rd. That the verdict in this case is not supported by the evidence.

4th. That the verdict in this cause is contrary to the evidence.

5th. That the Court failed to give a written charge to the jury.

6th. That the Court failed to instruct the Jury on the doctrine of reasonable doubt.

18 7th. That the Court allowed to go to the Jury improper evidence, in this:

It allowed the defendant, Hendrix, to be examined upon a case in which he was alleged to be the prosecutor, that occurred before a Justice of the Peace of Pontotoc County, Oklahoma, in which he was alleged to have had arrested for incest, B. Woods and his sister Hattie, witnesses against him in this case, and allowed the substance of the warrant of arrest and the judgment of the Justice thereon, and the proof introduced in the case, to go before the Jury in this, over the protests of the defendant Hendrix, through his counsel, who asked for the record that was made in that case, averring that the record was the only legal evidence that could properly be introduced, which action of the Court, defendant avers was very much to his own injury, and against the law.

It allowed evidence to go before the jury in this case, of the various and sundry alleged criminal actions of the father of the defendant herein, Will Hendrix, which action of the Court in this cause, the defendant says, was a great injury to him, and as he thinks, was illegal and improper.

8th. That the Court refused the defendant the benefit of the testimony of his wife, Evalina Hendrix, who was present in open Court and ready and willing to testify to many facts, and they the most material to his defense; and of most of these he had no other witness. That she would have testified as to the incestious assault made on her by Robert Voss at Sulphur, Oklahoma, some three years previous to the killing; and thus fully corroborated witness Zora Daniels; that she would have testified to the incestuous assault made by Robert Voss on her on the Thursday night preceding the killing on Sunday, and thus fully corroborated the witness Clemmie Hendrix. But of the following facts, defendant had no witnesses except his said wife, to wit:

That said Robert Voss began his criminal conduct and treatment and incestuous attempts toward said Evalina Hendrix when she was in her sixteenth year. That he, to her knowledge, had similar course

of conduct toward her elder sister, even before that. That he always assured these two girls that he was not their father and that as a fact, their mother, Nancy Voss, was the mother of a child before she was ever married. That in his treatment towards said two girls, Evalina and her sister, the said Robert Voss brought about the separation and finally the divorce between him and Nancy Voss. That he was cruel, working said two girls as plow hands in the fields, marking off their tasks at the beginning of each day, and applying the lash at night if those tasks were left undone. That with all his said conduct and conversation Evalina still regarded him as her father and still retained, in some degree that affection a child should retain for her father. That he often promised them to do better and she still kept his conduct, in a great measure a secret, hoping for his reformation. That on the Thursday night before the killing, after his last assault, she began to see that this course of conduct should not be allowed to go on further. That she resolved to and did tell her husband of said last assault, but before she would tell him she made him agree that he would do nothing rash, but would only go to Voss and endeavor to *to* get him away. That on the day preceding the killing her mother had told her of Voss's threats on defendant's life; that he himself, had threatened Hendrix in her presence, and that she told him of this fact and warned him t*i* watch Voss. That when he went down to where the killing occurred, he went on a mission of peace and not of war. That said Evalina would positively deny that she ever asked said Voss to eat with her after said Thursday, or that he was kept around the premises to wait on her and the children at that time.

Defendant says that he could not have proved these facts by any being in the world except his said wife, and that they were vital to his defense before a Jury.

9th. Defendant says that the Jury in their verdict of guilty without capital punishment did not speak the intent of the entire jury, and that all of said jury did not understand the said verdict meant a life penalty, b*t* believed at the time that they rendered the verdict that it would be a manslaughter verdict. That one of their number, L. R. Alexander, so testified in an affidavit which is hereto annexed, marked Exhibit "A" hereto and made a part hereof, as fully as though herein copied, which speaks for itself, and sustains the statement above that said jury did not understand or intend the verdict rendered.

That three other Jurors, to wit: C. W. Wortes, R. J. Acton and J. M. McCastle, did not understand the verdict any better than did R. L. Alexander, who swore to Exhibit "A" hereto. That three last parties have not yet been seen, but have definitely been heard from, and time is asked for the production of all said jurors so that the Court may understand what their intent was in the finding of said verdict.

Wherefore, defendant prays again, that said verdict be set aside and a new trial be granted him in order that justice may be reached in this cause.

his
WILL x HENDRIX.
mark.

I, ——— ———, make oath that the above petition and affidavit is true in substance and in fact.

his
WILL x HENDRIX.
mark.

Subscribed and sworn to before me, this the 8th day of March, A. D. 1909.

A. O. BRACKETT, *Clerk.*
By JNO. S. STONE, *Deputy.*

EXHIBIT "A."

STATE OF TEXAS,
Delta County:

I, L. R. Alexander, of Delta County, after being duly sworn, say that I was one of the jurors impaneled in the United States Court for the Eastern District of Texas, to try the case of the United States vs. Will Hendrix, at Paris Texas on the 4th day of March, 1909, wherein a verdict was rendered on the 6th day of March, 1909, finding the defendant guilty of murder as charged in the indictment, without capital punishment, that I did not understand what the punishment would be on such a verdict, I understood at the time I agreed to said verdict that the punishment would be only two years in the penitentiary. I was not willing, at any time to
21 find*ing* a verdict carrying a greater penalty than two years and was led to believe that *that* the verdict we rendered would only carry a penalty for two years. I was in favor of a verdict for manslaughter, and did not believe that defendant should receive a greater penalty than two years, and would *have* never have consented to the verdict we rendered, had I thought or believed said verdict would carry with it a life penalty.

L. R. ALEXANDER.

Subscribed and sworn to before me this the 7th day of March, 1909.

R. D. HUMPHREYS, *J. P.,*
Ex Officio Notary Public, Delta County, Texas.

(Endorsed:) No. 2087. United States vs. Will Hendrix. Defendant's motion for new trial. Filed March, 1909, A. O. Brackett, Clerk, by Jno. S. Stone, Deputy.

* * * * * * *

(*Order Overruling Motion for New Trial.*)

No. 2087.

THE UNITED STATES
vs.
WILL HENDRIX.

TUESDAY. *March 9th*, 1909.

On this day came on to be heard the motion of the defendant to set aside the verdict of the Jury rendered in said cause on the 6th day of March, 1909, and grant him a new trial, which motion being duly considered by the Court, the Court is of the opinion that the law is against said motion, It is therefore, ordered adjudged and decreed by the Court, that said motion be, and the same is overruled. To which ruling of the Court, the defendant, through his attorney, in open Court, excepted and gave notice of appeal to the Supreme Court of the United States.

22 (*Affidavit- of L. R. Alexander and R. J. Action, Jurors.*)

UNITED STATES OF AMERICA
vs.
WILL HENDRIX.

Affidavits, Alexander & Acton, Jurors.

We, —— —— — —— ——, on our oaths do say, That we were jurors serving on the jury in the above styled cause, and that as such jurors, we brought into court, a verdict against the defendant of "Guilty, but without capital punishment." That we did not know the full meaning of such verdict at the time we rendered it, that is, that it meant a life sentence in the penitentiary, or we would never have consented and rendered it as our verdict in this cause. We did not know that it would prevent the Judge from reducing the sentence below a life imprisonment, and the time of punishment was discussed among us, and some of us remarked that it meant a sentence of any time from two to ninety-nine years, and this was our common understanding of what the verdict would be. Some of our number were for a light two year sentence, and consented to the verdict reported because, believing that the Court could, that he would, put on defendant a light sentence.

But we say, had we known that the verdict rendered meant a life sentence, and nothing less, we would never have reported it. We did not think defendant deserved so severe a sentence.

L. R. ALEXANDER.
R. J. ACTON.

Subscribed and sworn to before me, this March 9th, 1909.

A. O. BRACKETT, *Clerk*,
By JNO. S. STONE, *Deputy*.

(Endorsed:) U. S. vs. Will Hendrix. Affidavit. Filed March 9th, 1909. A. O. Brackett, Clerk, by Jno. S. Stone, Deputy.

23 (*Affidavit of C. M. Wartes, Juror.*)

In United States District Court, Sitting at Paris, Texas.

Affidavit, C. M. Wartes, Juror.

UNITED STATES
vs.
WILL HENDRIX.

Affidavit.

I, C. M. Wartes, on my oath do say, that I was on the jury in the above cause that returned a verdict into Court Saturday last, of "Guilty, without capital punishment," and that I never intended to give to the defendant a life sentence in that verdict, and had I known the import of that verdict, I would have hung that jury till this hour. I do not think there was a man on the Jury that wanted or expected a life sentence. It was discussed among us as to what the term of service in the penitentiary would be, and it was thought the term of sentence could be two years, and that was all I was for him receiving and so said.

C. M. WARTES.

Subscribed and sworn to before me, this, the 9th day of March, 1909.

A. O. BRACKETT, *Clerk*,
By JOHN S. STONE, *Deputy*.

(Endorsed:) D. Cr. No. 2087. The United States, vs. Will Hendrix. Affidavit of C. M. Wartes. Filed March 9th, 1909. A. O. Brackett, Clerk, by Jno. S. Stone, Deputy.

24 (*Affidavit of Juror J. R. West.*)

Before me, the undersigned authority, this day personally appeared J. R. West, who being duly sworn, on his oath states that he resides near Petty Texas, and that he was a member of the jury that returned a verdict on the 6th day of March, 1909, in which the defendant Will Hendrix, whom the had in charge was found guilty of murder as charged in the indictment without capital punishment. That the judge, in his charge to the jury, instructed the jury that the question of punishment was not for the jury, but

that they should find the fact as to what the defendant was guilty of, whether of murder in the first degree, manslaughter or whether he was justified on the ground of self defense. That affiant fully understood the instructions of the Court, and the matter was discussed in the jury-room, and affiant believes that all the jurors fully understood that they were not to fix the punishment.

During the discussion upon this point, some one of the jury remarked that the punishment was in the discretion of the Court and that in their opinion, the Court could punish the defendant by sending him to the penitentiary for life, or that he might punish him by sending him to the penitentiary as low as two years.

J. R. WEST.

Subscribed and sworn to before me this 9th day of March, A. D. 1909.

A. O. BRACKETT,
Clerk U. S. District Court,
By JNO. S. STONE, *Deputy.*

(Endorsed:) D. Cr. 2087. United States vs. Will Hendrix. Affidavit J. R. West, contra, Motion for New Trial. Filed March 9th, 1909. A. O. Brackett, Clerk, by Jno. S. Stone, Deputy.

25 (*Affidavit of Juror W. S. Miller.*)

In the United States Court for the Eastern District of Texas, at Paris, Texas.

UNITED STATES
vs.
WILL HENDRIX.

I, W. S. Miller, being duly sworn, on his oath says that he reside at Lake Creek in Delta County, Texas; that he was the *fo* foreman of the jury in the above entitled cause who on the 6th of March returned into open Court a verdict finding the defendant, Will Hendrix, guilty of murder as charged in the indictment without capital punishment; that the Judge in his charge instructed the jury, substantially, that the question of punishment was not for the jury, but that they were simply to pass upon the facts whether or not the defendant was guilty of murder in the first degree or manslaughter as these offenses were defined by the Court or whether the defendant should be acquitted on his plea of self defense; that in the discussion the jury all recognized the fact that they had nothing to do with the punishment as charged by the Court, during the discussion some one of the jury remarked that the punishment was in the discretion of the Court and that he might give the defendant a term in the penitentiary for life or he might give him as low as two years. That the questions of murder, manslaughter and self defense were fully discussed by the jury, they all agreed upon the verdict of guilty of murder without capital punishment and they all under-

stood the verdict. The verdict as written was read several times to the jury. They all said it was their verdict and the verdict was returned into Court.

W. S. MILLER.

Subscribed and sworn to before me this, the 9th day of March, 1909.

A. O. BRACKETT, *Clerk,*
By JNO. S. STONE, *Deputy.*

(Endorsed:) U. S. Dis't Court, D. Cr. 2087. The United States vs. Will Hendrix. Affidavit W. S. Miller. Filed March 9th, 1909. A. O. Brackett, Clerk, by Jno. S. Stone, Deputy.

26 (*Petition for 60 Days for Bill of Exceptions, &c.*)

In the District Court of the United States in and for the Eastern District of Texas.

UNITED STATES
vs.
WILL HENDRIX.

Application for 60 Days to File, &c.

In this cause the defendant, Will Hendrix, through his attorney R. McMillan, most respectfully petitions the Court to allow him sixty days from this date in which to prepare his petition for a writ of error and to prepare and file bills of exceptions and to prepare the record for appeal to the Supreme Court of the United States.

R. McMILLAN,
Attorney for Defendant.

(Endorsed:) D. Cr. No. 2087. United States vs. Will Hendrix. Application for 60 days &c. Filed March 9th, 1909. A. O. Brackett, Clerk, by Jno. S. Stone, Deputy.

* * * * * * *

(*Order Allowing 60 Days to Prepare Bill of Exceptions, &c.*)

In the District Court of the United States in and for the Eastern District of Texas.

UNITED STATES
vs.
WILL HENDRIX.

Order Allowing 60 Days to File, &c.

Came the parties, plaintiff and defendant, and their attorneys of record, on this the 9th day of March, upon the application of Will

Hendrix, the defendant herein, for 60 days from this date in which to prepare his petition for a writ of error, to file his Bill of Exception and the full record for appeal to the Supreme Court of the United States. And upon consideration the Court is pleased to and hereby allows said sixty days from this date in which to prepare & file said petition and record.

D. E. BRYANT, *Judge.*

(Endorsed:) D. Cr. 2087. United States vs. Will Hendrix. Order allowing 60 days to prepare and file petition for writ of error &c. Filed March 9th, 1909. A. O. Brackett, Clerk, by Jno. S. Stone, Deputy.

27 *Bill of Exception, No. 1.*

Murder. No. 2087.

UNITED STATES
vs.
WILL HENDRIX.

Be it remembered that on the trial, the following proceedings were had: That on the 4th day of March, 1909, the defendant filed and presented in open Court to the Hon. David E. Bryant, Judge, a motion denying the jurisdiction of said Court, which motion is as follows, to wit:

Murder. No. 2087.

UNITED STATES OF AMERICA
vs.
WILL HENDRIX.

Now comes the defendant, Will Hendrix, in the above entitled cause and respectfully shows the Court that the crime of which the defendant stands charged in this Court, to wit: the murder of Robert W. Voss, was committed near the town of Pauls Valley and within the limits of what is now Garvin County, in the State of Oklahoma, on the 15th day of April, 1906.

That said cause was transferred from the United States Court within and for the Indian Territory, to this Court before Oklahoma became a state. That under an Act of Congress known as the "Enabling Act", passed June 15th, 1906, all criminal cases pending in the United States Courts within and for the Indian Territory, were transferred to the District Courts of the State of Oklahoma, and of the County of said State where the alleged offense is said to have been committed.

Wherefore, the defendant prays that this cause be transferred to the District Court of Garvin County, in the State of Oklahoma, to the end that said cause may be tried in County and State where alleged to have been committed, in pursuance of the Constitution of the United States and the statutes made in pursuance thereof.

28 In the United States Court for the Eastern District of Texas.

I, Robinson McMillan, on my oath, do say that I am now and have been since, previous to the committal of Will Hendrix on his first trial by Court, one of his attorneys of record. That I was instrumental in having the cause moved from Pauls Valley, Southern District of Indian Territory, to Paris, Texas, and that my reasons for so doing were, among other things, but first and most important of all, the undue prejudice of the then presiding Judge of the Southern District of the Indian Territory, to wit: J. T. Dickerson.

That under the Federal Statute permitting said removal to be made, the same was done by the defendant, Will Hendrix on my advice and suggestion, especially for the reason above mentioned, because, at the time, both he and I believed that he could not get a fair trial owing to the prejudice of the said J. T. Dickerson, Judge. That the said J. T. Dickerson was outspoken in his opposition to the said Will Hendrix having talked to me, myself, regarding said Hendrix and made such declarations time and again that caused me to believe that, though an honest man that he was, and as I believed him to be, that he could not, entertaining such convictions as he claimed to entertain, do justice to the said Will Hendrix in the trial of said cause.

Wherefore, this affidavit is made and filed herein in connection with the motion, this day made that the venue be changed back to Pauls Valley, Oklahoma, where it properly belongs.

R. McMILLAN.

Subscribed and sworn to before me this the 4th day of March, A. D. 1909.

A. O. BRACKETT,
Clerk U. S. Court, E. D. Tex.

Which said motion was overruled by the Court, to which action of the Court in overruling said motion, the defendant, then and there excepted, and here presents his Bill of Exceptions, marked No. 1, and prays that it be allowed by the Court and ordered filed as a part of the record in this case.

R. McMILLAN &
E. W. FAGAN,
Attorneys for Defendant.

29 Allowed this April 30th, 1909.

D. E. BRYANT, *Judge.*

(Endorsed:) Cr. No. 2087. United States vs. Will Hendrix. Bill of Exception, No. 1. Filed 30 day Apl. 1909. A. O. Brackett, Clerk, by C. C. Bumpas, Dep.

30 *Bill of Exception, No. 2.*

In the United States District Court, Sitting at Paris, Texas.

UNITED STATES
vs.
WILL HENDRIX.

Be it remembered on the trial of the above entitled cause the following proceedings were had: Defendant had his wife, Evilena Hendrix sworn and placed on the stand to testify in his defense and offered to prove by said witness the following facts, which were material to the defense, as follows, to wit:

That on the Sunday of the killing she had met her husband when he returned home in the buggy, that she had been crying and was very much depressed because of conditions at home; that she went with him to his room, and he asked her what was the matter, and she told him that she could not tell it all now, but for God sake to get her father off the premises; to buy him out, or to trade him out or do something to get him away. That he kept pressing her to tell him and she said no, but after he has gone I will tell you all that has occurred. He kept insisting that she tell him, and at last she told him that on Thursday night (Thursday night before the killing) and during the time that the little girl Clemmie Hendrix was sleeping in her room that Voss, her father, came to her bed and was trying to have intercourse with her. That she screamed and woke Clemmie up and the children and that neither she nor Clemmie slept any more that night; and that she begged him and told him she would scream and prevailed upon him until she got him to go away. He told her that she must not kick, that she was a bastard and not his child, but that she finally was successful and got him to go away. That she knew that if she let this thing go on and her husband found it out from some other source that he would believe that she was living untrue to him. That, knowing her husband's disposition, and that if she would tell him the whole truth, that he would kill her father, that under this impression she cried and took on, and that was the reason she told her husband what occurred and went no further than she did. That she had
31 before this told her husband of the affair at Sulphur, but said that her father had agreed to let her alone in the future, and she had asked her husband to do nothing about it and that he had agreed to do nothing about it then, but had known all about the Sulphur incident all the time. That on the day of the killing when he returned in the buggy he was suspecting nothing, but upon seeing her condition the conversation hereinbefore related took place. That thereafter the killing occurred. Defendant proposes to show by this witness that her father was a man of reasonably fair education. That she herself nor any of her brothers or sisters could read or write. That he was a leacherous man and that she herself had seen him go to bed of her elder sister. That she has had to watch

him since she was sixteen years old; and that when she was sixteen years old he assailed her. That her mother knew full well his disposition and that the evening before the killing her mother knew something of it and asked her why she had come over to her house to get her to stay all night with her. That that night her mother said "Lee I'm afraid there is going to be trouble between Will and the old man." That she said that while going across the field toward Will Hendrix's home. She denies that there *was* three trips made by Will Hendrix in an easterly direction from his house before the old man was killed, and denies that Will Hendrix, after the killing, went to the house where the killing occurred three times. That at the time of the shots there was a turmoil of excitement, and she supposes she stated what was related by her mother "there, Pa has killed my baby" as that was what she expected to happen if he got the drop on Will, that he would kill him. That Will's mission down there was to get the old man away and not to have any trouble, and that she thought at the time the shots were fired that Will had gone down there and the old man had killed him.

The United States, through her attorney, the Hon. Jno. B. Dailey, objected to the introduction of said witness, on the ground that she was the wife of defendant and therefore incompetent as a witness in said cause. The Court sustained said objection and refused
32 to allow said witness to testify in the case. To which action of the Court, in sustaining said objection and refusing to allow said witness to testify in his defense, the defendant, then and there, excepted, and here presents his Bill of exception No. 2 and asks that it be allowed, signed and ordered filed as a part of the record in said cause.

R. McMILLAN &
E. W. FAGAN,
Attorneys for Defendant. Will Hendrix.

Allowed this April 30, 1909.

D. E. BRYANT, *Judge.*

(Endorsed:) Cr. No. 2087. United States vs. Will Hendrix. Bill of exception, No. 2. Filed Apl. 30, 1909. A. O. Brackett, Clerk, by C. C. Bumpas, Dep.

33 *Petition for Writ of Error.*

In the District Court of the United States for the Eastern District of Texas, at Paris.

Will Hendrix, a citizen of the United States, and a resident of the State of Oklahoma, formerly the Chickasaw Nation, Indian Territory, respectfully represents that on the 15th day of April 1906, he was arrested in said Chickasaw Nation, Indian Territory, and confined in the United States jail at Pauls Valley; was charged with having committed the crime of murder; was returned into Court at Pauls Valley in said Chickasaw Nation, Indian Territory.

Said Court was presided over by the Hon. J. T. Dickerson, District Judge for the Southern District of Indian Territory. That after said indictment had been so returned, defendant, Will Hendrix, obtained a change of venue from said Southern District of the Indian Territory to the United States District Court for the Eastern District of Texas, at Paris, Texas, presided over by the Hon. David E. Bryant, Judge. And on said indictment, defendant Will Hendrix, on trial on the 4th day of March, 1909, and afterward to wit; on the 6th day of March, 1909, the jury selected to try said cause, returned into court a verdict finding your petitioner guilty as charged in the said bill of indictment (without capital punishment) and on the 9th day of March, 1909, Hon. David E. Bryant pronounced and filed and entered sentence that your petitioner be imprisoned at hard labor in the penitentiary of the United States, situated at Atlanta, Georgia, for the term and period of his natural life.

34 Your petitioner alleges that in the trial and proceedings in said cause, great and manifest errors were committed which will appear upon an inspection of the record in said cause. That he has not had a fair and impartial trial by a court having legal jurisdiction over him. That he has not been convicted by due process of law.

Wherefore, your petitioner prays for a writ of error to be directed to the Clerk of the District Court of the United States, at Paris, Texas, directing him to transmit a true copy of the record and all proceedings in this cause under his hand and the seal of this Court.

R. McMILLAN &
E. W. FAGAN,
Attorneys for Petitioner.

Allowed this April 30th, 1909.

D. E. BRYANT, *Judge.*

(Endorsed:) Cr. No. 2087. United States vs. Will Hendrix. Petition for writ of error. Filed 30 day of Apl. 1909. A. O. Brackett, Clerk, by C. C. Bumpas, Dep.

35 *Assignment of Errors.*

In the District Court of the United States, Eastern District of Texas, at Paris, Texas.

THE UNITED STATES
vs.
WILL HENDRIX.

Now comes Will Hendrix, defendant in the above entitled cause complaining of the trial, judgment, proceedings, rulings and sentence in said cause, and says that he has been tried and convicted without due process of the law of the land, and that he has been deprived of his liberty and sentenced to penal servitude for life without jurisdiction so to try and convict him.

Your respondent, Will Hendrix, alleges that in his trial and conviction great and manifest errors, to the injury of respondent were committed which he specifies as follows:

1st. Because the United States Court for the Eastern District of Texas, did not have jurisdiction to try said cause, and the Court erred in overruling defendant's motion to transfer said case to the District Court of Garvin County, Oklahoma, because, under the "Enabling Act" under which Oklahoma became a State, passed by Congress June 16th, 1906, all criminal cases pending in the United States Courts within and for the Indian Territory, were transfer-ed to the District Courts of the State of Oklahoma and to the County of said State wherein the alleged offense is said to have been committed, and the offense for which defendant was tried in this cause was committed in what is now Garvin County, State of Oklahoma.

2nd. The Court erred in sustaining the objection of the United States to the introduction of defendant's wife, Mrs. Evilina Hendrix and refusing to allow her to testify in behalf of defendant, for the reason that her testimony as shown by the Bill of exception in this cause was vitally material to his defense, and stated facts defendant could not prove by any other witness, and because, under the criminal procedure of the State of Texas, the forum where the case was tried, permits a wife to testify in her husband's defense.

3rd. The Court erred in overruling defendant's motion for
36 a new trial in this cause and in refusing to grant defendant a new trial, because,

1st. The United States Court for the Eastern District of Texas was without jurisdiction.

2nd. Because defendant's wife was not allowed to testify in his defense.

3rd. Because the attorney for the United States was permitted to prove, over the objection of defendant that defendant's father had committed crimes in the Indian Territory and because that the Jurors did not understand that their verdict would carry with it a life sentence for this defendant, as shown by Bill of Exception, No. — and affidavits of said jurors attached to said motion.

For the errors stated and apparent upon the record herein, respondent prays that the judgment be reversed and the cause remanded for a new trial.

Defendant, WILL HENDRIX,
By His Attorneys, R. McMILLAN &
E. W. FAGAN.

(Endorsed:) United States vs. Will Hendrix. Assignment of Errros. Filed 30 day Apl. 1909. A. O. Brackett, Clerk, by C. C. Bumpas, Dep.

37 In the District Court of the United States for the Eastern District of Texas, at Paris.

D. Cr. No. 2087.

THE UNITED STATES OF AMERICA
vs.
WILL HENDRIX.

The President of the United States of America to J. W. Ownby, United States Attorney and Attorney of Record for the Defendant in Error, The United States, Herein and Below Mentioned, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States in the City of Washington, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Texas, at Paris, Texas, wherein William Hendrix is plaintiff in error and the United States of America, is defendant in error, to show cause, if any there be, why the judgment rendered against said William Hendrix, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David E. Bryant, Judge of the United States District Court for the Eastern District of Texas. This 30th day of April, A. D. 1909.

[Seal United States District Court, Eastern District of Texas.]

D. E. BRYANT,
United States District Judge.

[Endorsed:] U. S. District Court, E. D. T., at Paris. No. 2087. D. Cr. William Hendrix, appellant, vs. The United States, appellee. Citation. Issued April 30th, A. D. 1909. A. O. Brackett, clerk. Returned and filed May 8th, 1909. A. O. Brackett, clerk, by Jno. S. Stone, deputy.

Marshal's Return.

Received this writ at Beaumont Texas, May 5th '09, and on May 6th '09, I handed a certified copy to the within named J. W. Ownby, in person at Beaumont Tex.

A. I. HOUSTON,
U. S. Marshal,
By F. A. PARKER, *Deputy.*

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Eastern District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, between William Hendrix, plaintiff in error, and The United States of America, defendant in error, a manifest error has happened to the great damage of the said William Hendrix, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to The Supreme Court of the United States together with this writ, so that you have the same at the City of Washington on the 31st day of May, next in the said Supreme Court, to be then and there held, and the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable David E. Bryant, Judge of the District Court of the United States for the Eastern District of Texas, the 30th day of April, in the year of our Lord, nineteen hundred and nine.

[Seal United States District Court, Eastern District of Texas.]

A. O. BRACKETT,
Clerk of the United States District Court,
Eastern District of Texas.

Allowed, April 30th, 1909, by

D. E. BRYANT,
United States District Judge.

I hereby certify that a true copy of the above writ has this day April 30th, 1909, been filed in the Clerk's office for use of defendant in error.

A. O. BRACKETT, *Clerk.*

[Endorsed:] No. 2087. Criminal Law. United States District Court, Eastern District of Texas, at Paris. William Hendrix, appellant, vs. The United States, appellee. Writ of error. Filed April 30, 1909. A. O. Brackett, clerk.

39 *(Clerk's Certificate.)*

I, A. O. Brackett, Clerk of the District Court of the United States for the Eastern District of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record,

bills of exception, assignment of errors, and all the proceedings in cause No. 2087, on the Criminal Docket of said Court, wherein The United States of America is Plaintiff and William Hendrix is Defendant, constituted and prepared in accordance with, and being all the papers enumerated in the præcipe for transcript filed by the attorney for the plaintiff in error, as fully as the same remain on file and of record in my office at Paris, Texas.

Witness my hand officially and the seal of said court at Paris, Texas, this the 17th day of May, A. D. 1909.

[Seal United States District Court, Eastern District of Texas.]

A. O. BRACKETT, *Clerk,*
By JNO. S. STONE, *Deputy.*

40 (*Clerk's Certificate of Transmissal.*)

I, A. O. Brackett, Clerk of the District Court of the United States for the Eastern District of Texas, do hereby certify that I received this writ on the 30th day of April, 1909, and that on this 25th day of May, 1909, I have transmitted to the Clerk of the Supreme Court of the United States at Washington, D. C., a true copy of the record and proceedings in the within named cause, duly certified under my hand and seal.

Witness, my hand and the seal of said Court, at my Office in the City of Sherman, the date and day last above named.

[Seal United States District Court, Eastern District of Texas.]

A. O. BRACKETT, *Clerk.*

Endorsed on cover: File No. 21,814. E. Texas D. C. U. S. Term No. 319. William Hendrix, plaintiff in error, vs. The United States. Filed September 10th, 1909. File No. 21,814.

Office Supreme Court, U. S.
FILED.
OCT 3 1910
JAMES H. McKENNEY,
CLERK.

(21,814.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

NO. 319.

WILLIAM HENDRIX, PLAINTIFF IN ERROR,

Vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

MOTION TO ADVANCE UNDER RULE 30, SUBDIVISION 4.

(21,814.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

NO. 319.

WILLIAM HENDRIX, PLAINTIFF IN ERROR,

Vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

MOTION TO ADVANCE UNDER RULE 26, SUBDIVISION 3.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

This is a criminal case. The plaintiff in error, William Hendrix, was, on the 28th day of May, 1906, indicted in the United States Court in the Indian Territory, within and for the southern district thereof at Pauls Valley, for the alleged murder of Robert W. Voss.

Said case was transferred to the United States District Court in and for the Eastern District of Texas, where on the 6th day of March, 1909, the said plaintiff in error, William

Hendrix, was by a jury found guilty in manner and form as charged in the indictment, without capital punishment. Print. Tr. of Record, pp. 3, 5, 7, 11.

On March 9th, 1909, in said United States District Court, in and for the Eastern District of Texas; the said plaintiff in error, William Hendrix, was adjudged guilty of the murder of Robert W. Voss in the Indian Territory, as charged in the indictment, and as found by the jury, and his punishment fixed and assessed, that he be imprisoned at hard labor in the penitentiary of the United States, at Atlanta, in the state of Georgia, for the term and period of his natural life. Which judgment and sentence is as follows, to-wit:

DISTRICT COURT.

No. 2087, Criminal Docket.

THE UNITED STATES

Vs.

WILLIAM HENDRIX.

"Tuesday, March 9th, A. D. 1909.

On motion of John B. Dailey, Esq., Assistant Attorney of the United States for the Eastern District of Texas, the above named defendant, William Hendrix, was this day brought to the bar of the court, in custody of the Marshal of said district, and being asked by the court if he had anything to say why judgment and sentence of the court should not be pronounced against him, in accordance with the verdict of the jury rendered in this cause on the 6th day of March, 1909, and the law in such cases made and provided, and no good cause being shown why the judgment and sentence of the court should not be pronounced herein,

It is therefore considered by the court that the defendant is guilty of the murder of Robert W. Voss, in the Indian Territory, as charged in the indictment and as found by the jury, and his punishment is fixed and assessed as follows, to-wit:

That he be imprisoned at hard labor in the penitentiary of the United States, situated at Atlanta, in the state of Georgia, for the term and period of his natural life.

It is therefore ordered, adjudged and decreed by the court, that the defendant be remanded to the custody of the marshal, and be, by him, committed to the jail of Lamar county, forthwith, and, as soon as practicable, that he be, by the marshal, conveyed to the United States penitentiary designated above and there be delivered to the custody of the keeper of the said penitentiary, who will receive and safely keep the said William Hendrix imprisoned at hard labor in said penitentiary, in execution of the sentence aforesaid.

It is further ordered that the clerk of this court issue a mittimus to the marshal of this district commanding the due execution of this decree.

And it is further ordered that the clerk of this court furnish the marshal with a certified copy of this judgment, sentence and order, which shall be delivered to the keeper of said United States penitentiary, at Atlanta, Georgia.

This order is qualified by the order this day entered as to the custody of the said Will Hendrix." Print. Tr. of Record, p. 12.

That said plaintiff in error, William Hendrix, was by the Honorable D. E. Bryant, judge of said United States

Court, for the Eastern District of Texas, ordered to be kept in jail at Paris, Texas, pending his appeal and the determination of his cause. Print. Tr. of Record, p. 13.

The said plaintiff in error, William Hendrix, is now in jail at Paris, Texas, awaiting the determination of his cause as shown by the following affidavit:

THE STATE OF TEXAS,)
Lamar County.) Before me, the undersigned authority, on this day personally came J. E. Harvey, who after being by me duly sworn, on his oath states, that he is deputy sheriff and jailer of Lamar county, Texas; that William Hendrix, who was ordered by the Honorable D. E. Bryant, judge of United States Court for the Eastern District of Texas, to be kept in the jail at Paris, Texas, to await the determination of his cause in the Supreme Court of the United States, is in custody in said jail, at Paris, Texas, awaiting the decision of his case.

J. E. HARVEY.

Sworn to and subscribed before me, this September 22d, A. D. 1910.

CHAS. S. NEATHERY,

Justice Peace and ex-officio a Notary Public in and for Lamar county, Texas. (Seal of Office.)

II.

In this case, *inter alia*, the jurisdiction of the United States District Court for the Eastern District of Texas to try the cause, and the trial, conviction, and sentence of plaintiff in error to penal servitude for life, without due process of the law of the land, are drawn in question.

III.

The plaintiff in error therefore prays that the case may be advanced upon the docket, and heard at as early a day as may be convenient to the court.

Notice of this motion has been served on the Attorney General and proof of service filed with the clerk of this court.

Respectfully submitted,

JAMES G. DUDLEY,

Of Counsel for Plaintiff in Error,

William Hendrix.

(5819)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-

WILLIAM [redacted], PLAINTIFF IN ERROR,

v.

THE UNITED STATES

ON WRIT OF THE SUPREME COURT OF [redacted]

BRIEF FOR PLAINTIFF IN ERROR

[redacted]

(21,814.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

NO. 319.

WILLIAM HENDRIX, PLAINTIFF IN ERROR,

Vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case:

Plaintiff in error, William Hendrix, was, on the 28th day of May, 1906, indicted in the United States Court in the Indian Territory within and for the Southern District thereof, at Pauls Valley, for the alleged murder of Robert W. Voss. Said case was transferred from the said United States Court in the Indian Territory, to the United States Court in and for the Eastern District of Texas, at Paris, Texas, by the following order:

ORDER REMOVING TO PARIS.

1934.—Murder.

UNITED STATES

Vs.

WM. HENDRIX.

"Now, on this day comes on to be heard the motion of William Hendrix herein, to have this cause transferred to the United States Court at Paris, Texas. The court being well advised in the premises, doth grant said motion and directs the clerk of this court to transmit this cause, as to William Hendrix, to the United States Court at Paris, Texas, together with the record and all papers herein, there to be docketed for such proceedings as may be legal and proper." Print. Tr. of Record, page 7.

On the 4th day of March, 1909, in the district court of the United States for the Eastern District of Texas, the plaintiff in error, William Hendrix, objected to the jurisdiction of said court, as appears from the following bill of exceptions:

BILL OF EXCEPTIONS NO. 1.

Murder.—No. 2087.

UNITED STATES

Vs.

WILL HENDRIX.

Be it remembered that on the trial the following proceedings were had; that on the 4th day of March, 1909, the defendant filed and presented in open court to the Honorable David E. Bryant, judge, a motion denying the jurisdiction of said court, which motion is as follows, to-wit:

Murder.—No. 2087.

UNITED STATES OF AMERICA

Vs.

WILL HENDRIX.

"Now comes the defendant, Will Hendrix, in the above

entitled cause, and respectfully shows the court, that the crime for which the defendant stands charged in this court, to-wit: the murder of Robert W. Voss, was committed near the town of Pauls Valley and within the limits of what is now Garvin county, in the state of Oklahoma. That said cause was transferred from the United States Court within and for the Indian Territory to this court before Oklahoma became a state. That under an act of Congress, known as the "Enabling Act," passed June 16, 1906, all criminal cases pending in the United States Court, within and for the Indian Territory, were transferred to the District Court of the State of Oklahoma, and of the county of said State where the alleged offense is said to have been committed. Wherefore the defendant prays that this cause be transferred to the District Court of Garvin county, in the State of Oklahoma, to the end that the cause may be tried in the county and state where alleged to have been committed, in pursuance of the Constitution of the United States, and the statutes made in pursuance thereof."

"*In the United States Court for the Eastern District of Texas*:

"I, Robinson McMillan, on my oath do say, that I am now and have been since previous to the committal of Will Hendrix on his first trial, one of his attorneys of record. That I was instrumental in having this cause moved from Pauls Valley, Southern District of the Indian Territory, to Paris, Texas, and that my reasons for so doing were, among other things, but first and most important of all, the undue prejudice of the then presiding judge of the Southern District of the Indian Territory, to-wit: Judge J. T. Dickerson. That, under the Federal Statute, permitting said removal to be made, the same was done by Will Hendrix on my advice and suggestion, especially for the reason above mentioned, because at the time, both he and I believed that he could not get a fair trial, owing to the prejudice of said J. T. Dickerson, judge; that said J. T. Dickerson was out-

spoken in his opposition to said Will Hendrix, having talked to me myself regarding said Hendrix, and made such declarations time and again, as caused me to believe that, though an honest man that he was, and as I believed him to be, that he could not, entertaining such convictions as he claimed to entertain, do justice to said Will Hendrix in the trial of said cause.

Wherefore this affidavit is made and filed herein in connection with the motion this day made, that the venue be changed back to Pauls Valley, Oklahoma, where it properly belongs."

(Signed) R. McMILLAN.

Subscribed and sworn to before me this the 4th day of March, A. D. 1909.

A. O. BRACKET,
Clerk U. S. Court, E. D. Tex.

Which said motion was overruled by the court, to which action of the court in overruling said motion, the defendant then and there excepted, and here presents his bill of exceptions, marked No. 1, and prays that it be allowed by the court and ordered filed as a part of the record in this case.

R. McMILLAN, and
E. W. FAGAN,
Attorneys for Defendant.

Allowed this April 30, 1909. Filed April 30, 1909.
D. E. BRYANT, Judge.

A. O. BRACKET, Clerk, by C. C. Bumpas.

Print. Tr. of Record, pages 21, 22.

"Order overruling motion of defendant to transfer case to Oklahoma."

No. 2087.

THE UNITED STATES

Vs.

WILL HENDRIX.

Tuesday, March 4th, 1909.

"The motion of defendant that this cause be remanded to Oklahoma being considered by the court, it is ordered that said motion be overruled, to which action of the court the defendant in open court excepted." Print. Tr. of Record, pages 9, 10.

This cause was tried in said district court of the United States, in and for the Eastern District of Texas, where on the 6th day of March, 1909, the plaintiff in error, William Hendrix, was by a jury found guilty in manner and form as charged in the indictment, without capital punishment." Print. Tr. of Record, page 11.

On the trial of the cause the defendant, William Hendrix, now plaintiff in error, had his wife, Evilena Hendrix, sworn as a witness, in his behalf, and offered to prove by her material facts in his defense. The court refused to allow the witness to testify, which testimony so offered and the ruling, and action of the court, in refusing to allow the witness to testify in the case, is shown by the following bill of exceptions:

In the United States District Court, Sitting at Paris, Texas.

UNITED STATES

Vs.

WILL HENDRIX.

"Be it remembered on the trial of the above entitled cause the following proceedings were had: Defendant had his wife, Evilena Hendrix, sworn and placed on the stand

to testify in his defense and offered to prove by said witness the following facts, which were material to the defense, as follows, to-wit:

That on the Sunday of the killing she had met her husband when he returned home in the buggy; that she had been crying and was very much depressed because of conditions at home; that she went with him to his room, and he asked her what was the matter, and she told him that she could not tell it all now, but for God's sake to get her father off the premises; to buy him out, or trade him out or do something to get him away. That he kept pressing her to tell him and she said no, but after he has gone I will tell you all that has occurred. He kept insisting that she tell him, and at last she told him that on Thursday night, (Thursday night before the killing) and during the time that the little girl Clemmie Hendrix was sleeping in her room, that Voss, her father, came to her bed and was trying to have intercourse with her. That she screamed and woke Clemmie up and the children, and that neither she nor Clemmie slept any more that night; and that she begged him and told him she would scream and prevailed upon him until she got him to go away. He told her that she must not kick, that she was a bastard and not his child, but that she finally was successful and got him to go away. That she knew that if she let this thing go on and her husband found it out from some other source that he would believe that she was living untrue to him. That knowing her husband's disposition, and that if she would tell him the whole truth, that he would kill her father; that under this impression she cried and took on, and that was the reason she told her husband what occurred and went no further than she did. That she had before this told her husband of the affair at Sulphur, but said that her father had agreed to let her alone in the future, and she had asked her husband to do nothing about it, and that he had agreed to do nothing about it then, but had known all about the Sulphur incident all the time. That on the day of the killing, when he re-

turned in the buggy, he was suspecting nothing, but upon seeing her condition the conversation hereinbefore took place; that thereafter the killing occurred. The defendant proposes to show by this witness that her father was a man of reasonably fair education; that she herself nor any of her brothers or sisters could read or write; that he was a lecherous man, and that she herself had seen him go to the bed of her older sister. That she has had to watch him since she was sixteen years old; and that when she was sixteen years old he assailed her; that her mother knew full well his disposition, and that the evening before the killing her mother knew something of it and asked her why she had come over to her house to get her to stay all night with her. That that night her mother said, "Lee, I'm afraid there is going to be trouble between Will and the old man." That she said that while going across the field toward Will Hendrix's home. She denies that there was three trips made by Will Hendrix in an easterly direction from his house before the old man was killed, and denies that Will Hendrix, after the killing, went to the house where the killing occurred three times. That at the time of the shots there was a turmoil of excitement, and she supposes she stated what was related by her mother, "there, pa has killed my baby," as that was what she expected to happen if he got the drop on Will, that he would kill him. That Will's mission down there was to get the old man away and not to have trouble, and that she thought at the time the shots were fired that Will had gone down there and the old man had killed him.

The United States, through her attorney, the Hon. Jno. B. Dailey, objected to the introduction of said witness, on the ground that she was the wife of defendant and therefore incompetent as a witness in said cause. The court sustained said objection and refused to allow said witness to testify in the case. To which action of the court, in sustaining said objection and refusing to allow said witness to testify in his defense, the defendant, then and there excepted, and here presents his bill of exceptions No. 2, and asks

that it be allowed, signed and ordered filed as a part of the record in said cause."

R. McMILLAN, and
E. W. FAGAN,
Attorneys for Defendant, Will Hendrix.

Allowed, this April 30, 1909.

D. E. BRYANT, Judge.

(Endorsed). Or. No. 2087, United States vs. Will Hendrix. Bill of Exceptions No. 2, filed April 30, 1909.

A. O. BRACKET, Clerk.
By C. C. BUMPAS, Deputy.

Print. Tr. of Record, pages 23, 24.

In the District Court of the United States for the Eastern District of Texas:

On the 6th day of March, 1909, the said plaintiff in error, William Hendrix, was by a jury found guilty in manner and form as charged in the indictment, without capital punishment. Print. Tr. of Record, page 11.

On March 9th, 1909, in said district court of the United States, in and for the Eastern District of Texas, after the overruling of his motion for a new trial, the said plaintiff in error, William Hendrix, was adjudged guilty of the murder of Robert W. Voss, in the Indian Territory, as charged in the indictment, and as found by the jury, and his punishment fixed and assessed, that he be imprisoned at hard labor in the penitentiary of the United States, at Atlanta, in the state of Georgia, for the term and period of his natural life. Which judgment and sentence is as follows, to-wit:

In the District Court of the United States, for the Eastern District of Texas.

District Court. No. 2087, Criminal Docket.

THE UNITED STATES

Vs.

WILLIAM HENDRIX.

"Tuesday, March 9th, A. D. 1909.

"On motion of John B. Dailey, Esq., assistant attorney of the United States, for the Eastern District of Texas, the above named defendant, William Hendrix, was this day brought to the bar of the court, in custody of the marshal of said district, and being asked by the court if he had anything to say why the judgment and sentence of the court should not be pronounced against him, in accordance with the verdict of the jury rendered in this cause on the 6th day of March, 1909, and the law in such cases made and provided, and no good cause being shown why the judgment and sentence of the court should not be pronounced herein:

It is therefore considered by the court that the defendant is guilty of the murder of Robert W. Voss, in the Indian Territory, as charged in the indictment and as found by the jury, and his punishment is fixed and assessed as follows, to-wit:

That he be imprisoned at hard labor in the penitentiary of the United States, situated at Atlanta, in the state of Georgia, for the term and period of his natural life.

It is therefore ordered, adjudged and decreed by the court, that the defendant be remanded to the custody of the marshal, and be, by him, committed to the jail of Lamar county, forthwith, and, as soon as practicable, that he be, by the marshal, conveyed to the United States penitentiary designated above, and there be delivered to the custody of the keeper of the said penitentiary, who will receive and safely keep the said William Hendrix imprisoned at hard

labor in said penitentiary, in execution of the sentence aforesaid.

It is further ordered that the clerk of this court issue a mittimus to the marshal of this district, commanding the due execution of this decree.

And it is further ordered that the clerk of this court furnish the marshal with a certified copy of this judgment, sentence and order, which shall be delivered to the keeper of said United States penitentiary, at Atlanta, Georgia.

This order is qualified by the order this day entered as to the custody of the said Will Hendrix." Print. Tr. of Record, page 12.

On the 30th day of April, 1909, a writ of error was allowed in this court by the Honorable D. E. Bryant, judge, upon the petition of plaintiff in error, William Hendrix, filed in this cause, together with an assignment of errors, also filed herein, in which is set out separately and particularly each error asserted and intended to be used. Print. Tr. of Record, pages 24, 25, 26.

The cause is now before this court in error to the district court of the United States for the Eastern District of Texas, which writ of error has been duly served. Print. Tr. of Record page 27.

The assignment of errors filed with the petition for a writ of error is as follows:

ASSIGNMENT OF ERRORS:

In the District Court of the United States, Eastern District of Texas, at Paris, Texas:

THE UNITED STATES

Vs.

WILL HENDRIX.

Now comes Will Hendrix, defendant in the above entitled cause, complaining of the trial, judgment, proceedings, rulings and sentence in said cause, and says that he

has been tried and convicted without due process of the law of the land, and that he has been deprived of his liberty and sentenced to penal servitude for life without jurisdiction so to try and convict him. Your respondent, Will Hendrix, alleges that in his trial and conviction great and manifest errors, to the injury of respondent were committed, which he specifies as follows:

1st. Because the United States Court for the Eastern District of Texas did not have jurisdiction to try said cause, and the court erred in overruling defendant's motion to transfer said case to the district court of Garvin county, Oklahoma, because, under the "Enabling Act," under which Oklahoma became a state, passed by congress June 16th, 1906, all criminal cases pending in the United States courts within and for the Indian Territory, were transferred to the district courts of the state of Oklahoma and to the county of said state wherein the alleged offense is said to have been committed, and the offense for which defendant was tried in this cause was committed in what is now Garvin county, state of Oklahoma.

2d. The court erred in sustaining the objection of the United States to the introduction of defendant's wife, Mrs. Evilena Hendrix, and refusing to allow her to testify in behalf of defendant, for the reason that her testimony as shown by the bill of exceptions in this cause, was vitally material to his defense, and stated facts defendant could not prove by any other witness, and because, under the criminal procedure of the state of Texas, the forum where the case was tried, permits a wife to testify in her husband's defense.

3d. The court erred in overruling defendant's motion for a new trial in this cause, and in refusing to grant defendant a new trial, because: 1st; the United States Court for the Eastern District of Texas was without jurisdiction; 2d; because defendant's wife was not allowed to testify in his defense; 3d; because the attorney for the United States was permitted to prove, over the objection of defendant, that defendant's father had committed crimes in the Indian Ter-

ritory, and because that the jurors did not understand that their verdict would carry with it a life sentence for this defendant, as shown by bill of exceptions No. — and affidavits of said jurors attached to said motion.

For the errors stated and apparent upon the record herein, respondent prays that the judgment be reversed and the cause remanded for a new trial.

Defendant, WILL HENDRIX.
By his Attorneys, R. McMILLAN and
E. W. FAGAN.

(Endorsed:) United States vs. Will Hendrix. Assignment of Errors, filed 30th day of April, 1909.

A. O. BRACKETT, Clerk.
By C. C. BUMPAS, Deputy.

Print. Tr. of Record, pages 25, 26.

ARGUMENT.

In the assignment of errors plaintiff in error complains of the trial, judgment, proceedings and sentence in this cause, and says that he has been tried and convicted without due process of the law of the land, and that he has been deprived of his liberty and sentenced to penal servitude for life without jurisdiction to so try and convict him, which he specifies as follows:

1st. Because the United States court for the Eastern District of Texas did not have jurisdiction to try said cause, and the court erred in overruling defendant's motion to transfer said cause to the district court of Garvin county, Oklahoma, because under the Enabling Act, under which Oklahoma became a state, passed by congress June 16, 1906, all criminal cases pending in the United States courts within and for the Indian Territory were transferred to the district courts of the state of Oklahoma, and to the county of said state wherein the alleged offense is said to have been committed, and the offense for which defendant was tried in this cause, was committed in what is now Garvin county, state of Oklahoma.

Art. III Section 2 of the Federal Constitution, *inter alia*, provides: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trials shall be held in the state where the said crimes shall have been committed, but when not committed within any state, the trial shall be at such place or places, as the congress may by law have directed." Under the fifth amendment to the Constitution no person can be deprived of his life or liberty without due process of law.

By the sixth amendment to the Constitution it is provided: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

Section 1 of the XIII amendment of the Constitution is as follows: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction."

Jurisdiction in Criminal Case, "*Strictissimi juris.*"

Jurisdiction in a criminal case is never presumed, but must always be shown, is never waived by a defendant, and want of jurisdiction can be attacked at any stage of a criminal proceeding or even collaterally. In re Neilson, 131 U. S., 176; U. S. vs. Rogers, 23 Fed. Rep., 662; In re Mills, 135 U. S., 270; In re Graham, 138 U. S., 451.

Paris Division of Eastern District of Texas; its jurisdiction.

This court was established under act of March 1, 1889, entitled, "An act to establish a United States *Court* in the Indian Territory and for other purposes." The exclusive jurisdiction of the United States *Court* in the Indian Territory at Muscogee, is set forth in the 5th section of the act.

The jurisdiction of the Paris Division of the circuit and district *courts* of the United States for the Eastern Dis-

trict of Texas in cases arising in that portion of the Indian Territory assigned to it by the act, is in the 18th section of said act, in these words: "And the United States *courts* herein provided to be held at Paris shall have exclusive original jurisdiction of all offenses committed against the laws of the United States within that portion of the Indian Territory attached to the Eastern Judicial District of the state of Texas by the provisions of this act, of which jurisdiction is not given by this act, to the *court* herein established in the Indian Territory."

Laws repealed and jurisdiction taken away.

By the act of March 1, 1895, entitled, "An act to provide for the appointment of additional judges of the United States *court* in the Indian Territory, and for other purposes," (28 Stat. L. 697) it is provided as follows: "All laws heretofore enacted conferring jurisdiction upon the United States *courts* held in Arkansas, Kansas and Texas, outside of the limits of the Indian Territory, as defined by law, as to offenses committed in said Indian Territory, as herein provided, are hereby repealed, to take effect on September first, eighteen hundred and ninety-six, and the jurisdiction now conferred by law upon said courts, is hereby given from and after the date aforesaid to the United States court in the Indian Territory: Provided that in all criminal cases where said *courts* outside of the Indian Territory shall have, on September first, eighteen hundred and ninety-six, acquired jurisdiction, they shall retain jurisdiction to try and finally dispose of such cases. Every case, civil and criminal, pending in the United States court in the Indian Territory, shall be tried and disposed of by the court where the same is pending, unless the venue therein be changed as herein provided."

The purpose of this section.

Under this section the United States *court* in the Indian Territory still held the jurisdiction given it under the 5th section of the Act of March 1, 1889, of all offenses against the laws of the United States, not punishable by death, or imprisonment at hard labor. Jurisdiction was given said

United States court in the Indian Territory after September 1, 1896, of all offenses whatsoever committed in said Indian Territory, expressly saving and excepting such cases as the United States circuit and district courts in Texas, Arkansas and Kansas had acquired jurisdiction of before that time, and repealed all laws conferring jurisdiction upon these courts after that date. *In re* Johnson, 167 U. S. 124; U. S. vs. Lee, 84 Fed. Rep., 626.

Law providing for change of venue.

The only law we have been able to find providing for a change of venue from the United States court in the Indian Territory to any court outside of such Territory, or to any court of the United States for the Eastern District of Texas, at Paris, Texas, will be found in the act of June 28, 1898, entitled, "An act for the protection of the people of the Indian Territory, and for other purposes."

Sec. 29. (Ratification of Agreement with Choctaws and Chickasaws). 30 Stat. L. 505. Which provides among other things as follows: "It is further agreed that the United States courts now existing, or that may hereafter be created in the Indian Territory shall have exclusive jurisdiction of all * * * persons charged with homicide, embezzlement, bribery, etc., * * * hereafter committed in the territory of said tribes, without reference to the race or citizenship of the person, or persons charged with such crime, and any citizen, or officer of the Choctaw or Chickasaw Nations charged with such crime shall be tried, and if convicted, punished as though he were a citizen or officer of the United States." * * * "Provided, that whenever a member of the Choctaw and Chickasaw Nations is indicted for homicide, he may, within thirty days after such indictment and his arrest thereon, and before the same is reached for trial, file with the clerk of the court in which he is indicted, his affidavit that he cannot get a fair trial in said court; and it thereupon shall be the duty of the judge of said court to order a change of venue in such case to the United States district court for the Western District of Ar-

kansas, at Fort Smith, Arkansas, or to the United States district court for the Eastern District of Texas, at Paris, Texas, * * * which courts shall have jurisdiction to try the case."

Extra-territorial jurisdiction by change of venue.

Notwithstanding all jurisdiction of crimes and offenses committed in the Indian Territory had been taken away from the District and Circuit Courts of the United States for the whole Eastern District of Texas, including the courts held at Paris, Texas, by the act of March 1, 1895, and the law conferring such jurisdiction expressly repealed, save and except as to cases pending where said courts had acquired jurisdiction, here was an attempt to confer jurisdiction on a *United States District Court at Paris, Texas*, by change of venue from a United States Court in the Indian Territory, an extra-territorial court.

No jurisdiction of capital crimes.

District courts of the United States have no jurisdiction to try capital cases, no jurisdiction to try a person indicted for murder, charged to have been committed on land, and no power or jurisdiction to sentence a person for a capital offense so committed, either to suffer death or life imprisonment.

U. S. R. S., Sec. 563, is as follows: "The district courts shall have jurisdiction as follows: First of all, crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section fifty-four hundred and twelve, Title 'Crimes.'" (Exception has no application here).

The Circuit Courts of the United States have exclusive jurisdiction of all capital cases. U. S. R. S., Sec. 629, twentieth subdivision.

The indictment in this case charges a crime, (murder)

punishable by death. U. S. R. S., Sec. 5339, and the offense is no less capital, although the jury by their verdict found the defendant (plaintiff in error) guilty as charged in the indictment, "without capital punishment." Fitzpatrick vs. U. S., 178 U. S., 304; Goodshot vs. U. S., 104 Fed. Rep., 257.

The United States Court in the Indian Territory had jurisdiction until taken away by the Enabling Act.

The indictment in this case charges the offense or crime of murder to have been committed by William Hendrix (plaintiff in error) on the 15th of April, 1906, within the Southern District of the Indian Territory. It was filed in said United States Court in the Indian Territory May 28, 1906. Print. Tr. of Record, pages 5, 6, and the Transcript of Record was filed June the 3d, 1906, at Paris, by A. O. Bracket, Clerk, by J. B. Dailey, deputy. Print. Tr. of Record, page 8. The record does not show the court in which the transcript of record was filed, nor that any court at Paris took jurisdiction of the person of Hendrix before his trial, March 6, 1909. On June the 16, 1906, Congress passed what is known as the "Enabling Act," an act to enable the people of Oklahoma and of the Indian Territory to form a constitution and state government and be admitted into the Union, on an equal footing with the original states. 34 Stat. L. 267.

Jurisdiction taken away without saving and excepting cases pending.

Sec. 20 of said Enabling Act, as amended by the act of March 4, 1907, is as follows: "That all causes, proceedings and matters, civil or criminal, pending in the district courts of Oklahoma Territory, or in the United States Courts in the Indian Territory, at the time said Territories become a state not transferred to the United States Circuit or District Courts in the State of Oklahoma, shall be proceeded with, held and determined by the courts of said state, the success-

ors of said District Courts of the Territory of Oklahoma and the United States Courts in the Indian Territory, with right to prosecute appeals or writs of error to the Supreme or Appellate Court of said state, and also with the same right to prosecute appeals or writs of error from the final determination in such cases made by the Supreme or Appellate Court of such state, to the Supreme Court of the United States, as is provided by law for appeals and writs of error from the Supreme, or final Appellate Court of a state to the Supreme Court of the United States. All criminal cases pending in the United States Courts in the Indian Territory not transferred to the United States Circuit or District Courts in the State of Oklahoma, shall be prosecuted to a final determination in the state courts of Oklahoma under the law now in force in that territory." 34 Stat. L., 1287.

Enabling Act accepted by Constitutional Convention of Oklahoma.

"Be it ordained by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocable, accept the terms and conditions of an Act of the Congress of the United States, entitled, "An Act to enable the people of Oklahoma and the Indian Territory to form a constitution and state government and be admitted into the Union on an equal footing with the original states; and to enable the people of New Mexico and Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original states," approved June the sixteenth, Anno Domini, nineteen hundred and six.

I hereby certify that the foregoing ordinance accepting the terms and conditions of the Enabling Act as the same has heretofore been passed and engrossed, was engrossed with the engrossed copy of the Constitution on parchment, was read as engrossed and roll call had thereon, and the same duly adopted by a majority of the votes of all the delegates elected to and constituting

this Convention at 11:41 o'clock, A. M., this 22d day of April, Anno Domini, 1907."

Wm. H. MURRAY, President,

The Constitutional Convention of the proposed State of Oklahoma.

Attest: JOHN McLAIN YOUNG, Secretary."

By the adoption of the Constitution by the people of Oklahoma at the election held in the same year and the approval of said Constitution by the president of the United States on November 16 1907, Oklahoma became a state.

Act June 28, 1898, so far as it conferred jurisdiction, repealed, jurisdiction fell with it.

The "Enabling Act" makes no exception or provision saving any cases pending in the United States Court in the Indian Territory, nor does it contain any provision saving and excepting cases then pending in any of the United States Courts at Paris, Texas, or in the Eastern District of Texas, on change of venue. All laws passed prior to this conferring jurisdiction on the United States Courts in the Indian Territory were repealed, and the courts abolished.

It is well settled that "when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction, and causes pending at the time fall, unless saved by provision of the statute."

United States vs. Boisdore, 8 How., 113.
Baltimore and P. R. Co. vs. Grant, 98 U. S., 398.
United States vs. Tymen, 11 Wall., 88.
Merchants Ins. Co. vs. Ritchie, 5 Wall., 541.
McNulty vs. Batty, 10 How., 79, 13 L. ed. 335.
Exparte McCradle, 7 Wall., 514, 19 L. ed. 265.
Downes vs. Bidwell, 182 U. S. 248, 45 L. ed. 1091.
Gwin vs. United States, 184 U. S. 675, 46 L. ed. 750.
Murphy vs. Utter, 186 U. S. 109, 46 L. ed. 1078.
Bird vs. United States, 187 U. S., 124, 47 L. ed. 103.
Colt vs. Young, 2 Blatchf, 473 Fed. Cas. No. 3032.

United States vs. Barr, 4 Sawy. 255, Fed. Cas. No. 14527.
United States vs. Hague, 22 Fed., 706.
United States vs. VanVilet, 23 Fed., 35.
Manley vs. Olney, 32 Fed. 709.
Birdseye vs. Sheffer, 37 Fed., 825.
Aspley vs. Murphy, 50 Fed., 377.
Postal Tel. Cable Co. vs. Southern R. Co., 89 Fed., 194.
Fairchild vs. United States, 91 Fed. 298.
Strong vs. United States, 93 Fed. 258.
Emblen vs. Lincoln Land Co., 94 Fed. 713.
United States vs. Jacobus, 37 C.C.A., 469, 96 Fed. 262.
United States vs. Kelley, 38 C.C.A. 276, 97 Fed.461.
Cincinnati Brewing Co. vs. Betteman, 102 Fed., 17.
Emblen vs. Lincoln Land Co., 42 C. C. A. 502, 102 Fed. 562.
McClain vs. Williams, 10 S. D., 336; 43 L. R. A., 289; 73 N. W., 72.
Raush vs. Morrison, 47 Ind. 416.
State ex rel Atty. Genl. vs. Wharton, 25 La. Ann. 32.
Waimsley vs. Nichols, 36 La. Ann., 801.
State ex rel Church vs. Weeks, 38 Mo. App., 579.
Olcott vs. Maclean, 10 Hun., 282.
State vs. Bank of Tennessee, 3 Baxt., 409.
Texas Mexican R. Co. vs. Jarvis, 80 Texas, 464; 15 S. W., 1089.

So if an act conferring jurisdiction is repealed, without reservation as to pending cases, they fall with it.

Sherman vs. Grinnell, 123 U. S., 679.
National Bank vs. Peters, 144 U. S., 570.
Gurnee vs. Patrick County, 137 U. S., 141.
United States vs. Kelley, 38 C.C.A. 276, 97 Fed. 461
Sims vs. Black Dog, 9 Oklahoma, 671.

And if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them.

South Carolina ex rel, Trenholm vs. Gillard, 101 U. S., 433.
Texas Mexican R.R. Co. vs. Jarvis, 80 Tex., 464.
Larkin vs. Safians, 15 Fed., 153.
Vance vs. Rankin, 198 Ill., 627.
Griffis vs. Payne, 22 Tex. Civ. App., 522.
Burlington vs. Burlington Traction Co., 70 Vt., 495.
Dulin vs. Lillard, 91 Va., 725.

In the case of South Carolina vs. Gillard, *supra*, this court says: "It is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them."

In the case of the Texas Mexican Ry. Co. vs. Jarvis, *supra*, Chief Justice Stayton delivering the opinion of the court, says: "The act in question * * * presents a case in which the jurisdiction of the courts ceased, stronger if possible, than in cases in which the statute conferring jurisdiction is subsequently repealed: * * * Many cases have arisen in which jurisdiction was conferred by statute, in which it was held by the highest courts in the land, that the repeal of the statute, divested the courts of power to hear and determine pending causes." (Citing authorities).

In United States vs. Boisdore, *supra*, this court said: "It is true that this court can exercise no appellate power over this case unless it is conferred upon it by act of congress, and if the laws which give it jurisdiction in such cases have expired, so far as regards claims in the state of Missouri, its jurisdiction over them has ceased, although the appeal was actually pending in this court when they expired.

On the 6th and 9th of March, 1909, nearly two years after the repeal of all laws conferring jurisdiction on the United States Courts in the Indian Territory and such

courts, including the court that transferred this cause to the United States Court at Paris, had expired and become extinct, and with it the law authorizing, and the power of, such court to make an order so transferring this cause, had been taken away and repealed by the act of congress known as the "Enabling Act," and the State of Oklahoma had been erected, and the state courts had succeeded to the jurisdiction of the United States courts in the Indian Territory, the plaintiff in error, over his objections and protest, was tried in the District Court of the United States for the Eastern District of Texas, at Paris, Texas, for the crime of murder, alleged to have been committed on the 15th of April, 1906, in the Indian Territory, upon an indictment filed in the United States courts for the Southern District of the Indian Territory, at Pauls Valley, on the 28th of May 1906, (nineteen days before the Enabling Act was passed by congress) was adjudged guilty of murder, and sentenced by said District Court of the United States for the Eastern District of Texas, at Paris, Texas, to penal servitude for life, (Print. Tr. of Record, pages 5, 6 and 10, 11 and 12.) when by law said court was without jurisdiction of the offense charged, and was without power to try and sentence the plaintiff in error.

Jurisdiction of the offense and of the person necessary.

The District Court of the United States for the Eastern District of Texas, to have had jurisdiction in this case by the order transferring the same, must not only have had jurisdiction of the offense, but must have obtained jurisdiction of the person of the defendant, by some means known to the law. In re Johnson, 167 U. S., bottom of page 124, and authorities cited.

There is nothing in the record to show that the District Court for the Eastern District of Texas took or obtained jurisdiction of the person of the defendant, William Hendrix, by any mode known to the law, either by custody or bail, until March 4, 1909, when he was arraigned for trial,

nor does the order transferring the case order said defendant to be delivered to the marshal of the Eastern District of Texas. The order transferring this case is fatal and void for uncertainty and does not find the jurisdictional facts necessary under the law.

The order of the United States Court for the Southern District of the Indian Territory transfers the case to the United States Court at Paris, Texas. (Print. Tr. of Record, page 7). There were the District and Circuit Courts of the United States for the Eastern District of Texas, at Paris, Texas, but no court by name "United States Court." To which of these courts was this case transferred? The law provided that it should be transferred to the District Court for the Eastern District of Texas, at Paris, Texas, or to the District Court of the Western District of Arkansas, at Fort Smith, Arkansas, besides the jurisdictional facts or findings authorizing such change of venue or transfer is not shown by the record or by the order of the court. Only a member of the Chickasaw or Choctaw tribes of Indians was named in the law as entitled to such change of venue upon making affidavit, that he could not get a fair and impartial trial in said United States Court for the Indian Territory. The order of the court appears to have been on the motion of the defendant, but consent could not give jurisdiction where the court was otherwise without jurisdiction or power to hear and determine.

The wife was a competent witness.

The second specification of error is: "The court erred in sustaining the objection of the United States to the introduction of defendant's wife, Mrs. Evilena Hendrix, and refusing to allow her to testify in behalf of defendant, for the reason that her testimony, as shown by the bill of exceptions in this case, was vitally material to his defense, and stated facts defendant could not prove by any other witness, and because, under the criminal procedure of the State of Texas, the forum where the case was tried, permits a wife to testify in her husband's defense." And plaintiff in error

here now further specifies that by the laws of Oklahoma, the forum where this case should have been tried, a wife is a competent witness to testify for her husband in all criminal prosecutions against him. The bill of exceptions which shows the facts proposed to be proven by the testimony of the wife, Mrs. Evilena Hendrix, and the action of the trial court in holding the wife incompetent to testify for the husband, and excluding her testimony from the jury, is set out in full on page 6 and 7 of this brief, to which reference is here made.

U. S. R. S., Sec. 858, provides: "In the courts of the United States no witness shall be excluded in any action on account of color, or in civil actions, because he is a party to or interested in the issue tried." (Then follows a proviso as to executors, administrators and guardians not material here). "In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law and in equity and admiralty. We are aware of the construction given this statute by this court in Logan vs. the United States, 144 U. S., 263, but we do not believe that case is conclusive of the question here presented. The question of the competency of the wife as a witness for her husband was not raised in the Logan case. In Lucas vs. Brooks, 18 Wall., 436, this court held that if the wife was a competent witness by the state statute, that was controling.

Art. 775 of the Code of Criminal Procedure of Texas, reads as follows: "The husband and wife may, in all criminal actions, be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other."

Under the Oklahoma statutes the wife is a competent witness for her husband. The statute is as follows: "Except as otherwise provided in chapters 68 and 69, of the Statutes of Oklahoma, the rules of evidence in civil cases, are applicable also in criminal cases: Provided, however,

that neither husband nor wife shall in any case be a witness against the other except for a crime committed one against the other, but they may in all cases be witnesses for each other, and shall be subject to cross-examination as other witnesses, and shall in no event on a criminal trial be permitted to disclose communications made by one to the other except on a trial of an offense committed by one against the other." Wilson's Revised and Annotated Statutes of Oklahoma, 1903, Criminal Procedure, page 1232, Section 5495; Snyder's Compiled Laws of Oklahoma, 1909, Criminal Procedure, page 1399, Section 6834. This was also the law in the territory of Oklahoma, (L. 1895, page 201) and was adopted by the Constitutional Convention of the State of Oklahoma as follows: "All laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma, until they expire by their own limitation, or are altered or repealed by law." Constitution of Oklahoma, Art. 24, Title Schedule, Section 2.

Offenses punishable with death, where tried.

U. S. R. S., Sec. 729, is as follows: "The trial of offenses punishable with death shall be had in the county where the offense *was* committed, where that can be done without great inconvenience." If the motion of plaintiff in error to remand this case to the District Court of Garvin county, Oklahoma, had been granted, he would have been tried in the county where the offense was committed, as provided in Sec. 729; not only that, his wife would have been a competent witness for him under the statute of Oklahoma. Her testimony detailing the diabolical acts of the deceased towards her, as shown in the bill of exceptions, was vital and material and would at least have reduced the killing to manslaughter.

Were these rights lost by transfer of the case?

Did the removal of the case to the Paris court, upon a ground, and for a reason that no longer existed, the prejudice of the judge of the United States Court of the Indian Territory, which court had been abolished, and such judge had ceased to be judge, forever take away from plaintiff in error his right to be tried in the vicinage where the alleged offense was committed, by a jury of such vicinage, and deprive him of the testimony of his wife, vouchsafed to him by the laws of the State and Territory where the homicide took place? If so, the law which was intended by congress specially for the benefit of members of the Choctaw and Chickasaw tribes, and for their protection against prejudice, operated as a snare and a delusion. See Texas, etc., R. R. vs. Humble, 181 U. S., 60.

The third specification of error complains of the action of the court in overruling defendant's motion for a new trial: 1st, "because the United States Court for the Eastern District of Texas was without jurisdiction;" 2d, "because defendant's wife was not allowed to testify in his defense;" 3d, among other things, "because the jurors did not understand that their verdict would carry with it a life sentence for this defendant, as shown by bill of exceptions No. — and affidavits of said jurors attached to said motion."

In connection with the motion for a new trial in this case were filed the affidavits of four of the jurors, who each swore he did not understand the verdict in this case to mean a life sentence for the defendant, and had he known that the only punishment, or sentence to the defendant, upon the verdict rendered, would be imprisonment for life, he never would have rendered such verdict, or consented to the same. Print. Tr. of Record, bottom of page 15 and pages 16, 17 and 18.

We are aware of the doctrine that jurors cannot be permitted to impeach their verdict. Mattox vs. United States, 146 U. S. 140. Does this rule apply here? The

jurors swore they did not understand the verdict rendered. The defendant was indicted for murder. This indictment included the offense of manslaughter. It appears from the affidavits of the jurors that the judge presiding, in his charge to them, instructed them on the law of murder and manslaughter, and self-defense. The verdict does not find the defendant guilty of murder in so many words, but finds "the defendant, William Hendrix, guilty in manner and form as charged in the within indictment without capital punishment." Print. Tr. of Record, page 11.

It is clear from the affidavits filed that the jury in this case discussed the punishment, and did not intend their verdict to carry a greater punishment than that for manslaughter.

Unanimity is one of the essential features of trial by jury; it was so at the common law, and is preserved and protected by constitutional guarantee. American Pub. Co. vs. Fisher, 166 U. S. 464; Springville vs. Thomas, 166 U. S., 707.

With this we submit the cause of our client. We were not of counsel in the case when it was tried in the court below, and know nothing about the case, except as is shown in the record, made and preserved by the learned counsel who faithfully represented the defendant (now plaintiff in error) at his trial.

Can it be held by this court, that the trial, conviction, and sentence, by which defendant was deprived of his liberty for life, was by "due process of law," and that his sentence to penal servitude for life, was as a punishment for crime, whereof he had been duly convicted? We think not.

Respectfully submitted,

JAMES G. DUDLEY,

Of Counsel for Plaintiff in Error,

WILLIAM HENDRIX.

Office Supreme Court, U. S.
FILED.
NOV 28 1910
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 319.

WILLIAM HENDRIX, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

SUPPLEMENTAL BRIEF OR REPLY FOR PLAINTIFF IN ERROR.

The learned assistant attorney general misconceives the controlling question in this case. It is *not* claimed that the United States statute defining and punishing the offense of murder has been repealed, nor is it necessary that such statute should have been repealed in order for our contention to find support. The question here raised is the jurisdiction of the District Court of the United States for the Eastern District of Texas, to try and sentence plaintiff in error for the offense of murder committed not in said dis-

trict, but charged to have been committed in the Southern District of the Indian Territory. If said District Court did not have jurisdiction, the trial, judgment, and sentence of said court "is not due process of law."

Scott *vs.* McNeal, 154 U. S., 34.

The only original jurisdiction the District and Circuit Courts of the United States for the Eastern District of Texas ever had over any offenses committed in the Indian Territory was conferred by statute (Act March 1, 1889). This jurisdiction was taken away, and the law conferring such jurisdiction repealed, by act March 1, 1895, expressly saving cases of which jurisdiction shall have been acquired by September 1, 1896. Thus the law stood when the act of June 28, 1898, was passed, attempting to confer jurisdiction on the United States District Courts for the Western District of Arkansas, and Eastern District of Texas at Fort Smith, Arkansas, and Paris, Texas, respectively, by change of venue, in cases only in which a member of the Choctaw and Chickasaw nations is indicted for *homicide*. We believe this law was unconstitutional and void because it attempted to confer jurisdiction by change of venue on a United States District Court at Paris, Texas, of a crime, the punishment of which is capital, when under the established law of the United States defining and providing for the jurisdiction of her courts, district courts have no jurisdiction to try capital cases, no jurisdiction to try crimes the punishment of which is capital. Suppose the law had provided for a change of venue to the United States Commissioner's Court at Paris, Texas, and the Commissioner's Court, because the law said so, had assumed jurisdiction and had tried and sentenced plaintiff in error for the crime of murder, as did the District Court of the United States at Paris, Texas, would it be "due process of law"? As we understand it, "due process of law," in a criminal case, by which one may be deprived

of life or liberty, means according to a course of judicial proceedings established and recognized by the law of the land, for the trial and punishment of such cases. Besides, if this act providing for a change of venue conferred any jurisdiction on the District Court of the United States at Paris, Texas, it was special and limited, applied only to members of the Choctaw and Chickasaw nations, indicted for homicide, on making a certain affidavit. Aside from the general rule that the record of a court having acquired jurisdiction of special and limited cases, must show such jurisdiction. This court has held there is no presumption in favor of the jurisdiction of the courts of the United States, but the jurisdictional facts, upon which jurisdiction rests must appear from the record.

Ex parte Smith, 94 U. S., 453.

This case is cited in the following cases:

Grace *vs.* Cent. Ins. Co., 109 U. S., 283.
Smith *vs.* McNeal, 109 U. S., 431.
Ins. Co. *vs.* Rhoads, 119 U. S., 239.
Fishback *vs.* West. U. Teleg. Co., 161 U. S., 100.

There is nothing in this record to show the jurisdictional facts upon which the jurisdiction of the court at Paris depended; that plaintiff in error is a member of the Choctaw and Chickasaw nations, or that he filed an affidavit setting up such fact, and that he could not get a fair trial in the United States Court for the Southern District, Indian Territory. On the contrary, the order changing the venue shows it was granted on motion.

Our contention is that there never was any legal change of venue of this case from the United States court in the Indian Territory and that the United States District Court at Paris, Texas, never legally acquired jurisdiction of the

case and of the person of Hendrix before the enabling act was passed. If we are correct in this, the case was still pending in the United States court in the Indian Territory when Oklahoma became a State, and the jurisdiction to try the case passed to the State court of Oklahoma under the enabling act. The argument of the assistant attorney general, that plaintiff in error cannot now raise this question, is unsound. It is elementary that consent cannot give jurisdiction. The jurisdiction must rest upon the jurisdictional facts upon which it depends, and upon the power of the court under the law to hear and determine, and not upon consent or even the most solemn agreement. The fact that the names William Hendrix and Evalena Hendrix appear on the roll proves nothing material to this enquiry. This court cannot judicially know that he is the same party charged with killing Robert W. Voss, or the same party who filed a motion to change the venue to the Paris court. Moreover, this court holds that the jurisdictional facts must have been alleged and shown. See *Ex parte* Smith, *supra*. The Ball and Boutwell case *from the Circuit Court* of the United States for the Eastern District of Texas, at Paris, Texas, it will be observed, and the other cases cited by the counsel for the Government on the question of former jeopardy, have no application to this question of jurisdiction. Finally, our contention is that if the District Court of the United States for the Eastern District of Texas got jurisdiction by change of venue when the enabling act was passed and Oklahoma became a State and the United States courts in the Indian Territory were abolished and the jurisdiction of said courts taken away and conferred upon circuit and district courts of the United States, and the State courts in said State, and absolutely wiping out the statute which conferred any jurisdiction on the United States District Court at Paris, by change of venue or otherwise, without saving cases pending in said court by change of venue from the United States

courts in the Indian Territory. The jurisdiction of the District Court of the United States for the Eastern District of Texas, at Paris, Texas, to try this case, if it ever had any, ceased, and said court had no power to try and sentence plaintiff in error for a crime the punishment of which is capital, upon the doctrine as old as this court, "That if an act conferring jurisdiction is repealed without reservation as to pending cases, they fall with it."

Respectfully submitted,

JAMES G. DUDLEY,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

WILLIAM HENDRIX, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 319.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

Plaintiff in error was indicted in the United States court at Pauls Valley, Ind. T., on May 28, 1906, for the murder of one Robert W. Voss. (Rec., p. 5 and 6.) On his application the case was transferred to the United States District Court at Paris, Tex. (Rec., p. 7.) On March 4, 1909, he made application that the case be removed from the United States District Court at Paris, Tex., to the District Court of Garvin County, State of Oklahoma, which was disallowed. (Rec., pp. 8 and 9.) Thereupon the case

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was tried, and the jury returned a verdict of guilty, without capital punishment (Rec., p. 11), and plaintiff in error was sentenced to imprisonment for life (Rec., p. 12). A motion for a new trial was entered and overruled (Rec., pp. 14, 17); and, errors being assigned, the case has been removed to this court by writ of error.

The questions presented will be considered in the order in which they appear in the assignment of errors.

I.

The United States District Court for the Eastern District of Texas had jurisdiction to try this case, and it was not error for that court to overrule plaintiff in error's motion to remove the case to the district court of Garvin County, State of Oklahoma.

1. *Statutes material for the determination of the questions presented.*

(*a*) Statutes relating to the offense:

By the fourth section of the act of March 1, 1895, chapter 145 (28 Stat., 693), it was provided that chapter 45 of Mansfield's Digest of the General Laws of Arkansas, entitled "Criminal Law," with certain exceptions mentioned, and certain other sections of said digest not here material, should be extended to and put in force in the Indian Territory; but it was also provided that "in all cases where the laws of the United States and the said criminal laws of Arkansas have provided for the punishment of the same offenses the laws of the United States shall govern as to said offenses."

Sections 1516 to 1531 of Mansfield's Digest relate to the offense of murder, and section 5339, Revised Statutes United States, declares that every person who commits murder, first, within any fort, arsenal, dockyard, magazine, or any other place or district or country under the exclusive jurisdiction of the United States * * * shall suffer death. This section with reference to punishment was modified by section 1 of the act of January 15, 1897, chapter 29 (29 Stat., 487), by providing that the jury may qualify their verdict by adding thereto "without capital punishment." Under the statutes of Arkansas the punishment to be inflicted upon conviction for murder in the first degree was death by hanging.

By the act of March 3, 1885, chapter 341, section 9 (23 Stat., 385), it was provided that "all Indians committing against the property or person of another Indian or person murder (or other designated offenses) within any Territory of the United States or within or without an Indian reservation shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases."

By the act of June 7, 1897 (ch. 3, 30 Stat., 62, pt. 6), it was provided that "the laws of the United States and of the State of Arkansas in force in the

Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like cases."

By the agreement between the Commission to the Five Civilized Tribes and the Choctaw and Chickasaw nations of Indians, ratified by act of June 28, 1898 (ch. 517, 30 Stat., 495, 511), which agreement appears as section 29 of said act, it was agreed that the United States courts then existing or that might thereafter be created in the Indian Territory "shall have jurisdiction * * * of all persons charged with homicide * * * hereafter committed in the territory of said tribes, without reference to race or citizenship of the person or persons charged with such crime; and any citizen or officer of the Choctaw or Chickasaw nations charged with such crime shall be tried, and if convicted, punished as though he were a citizen or officer of the United States."

It was, therefore, under section 5339, Revised Statutes, as modified by the act of January 15, 1897, and the said provisions extending the same to offenses committed by Indians, that plaintiff in error was indicted and convicted.

(*b*) Statutes relating to jurisdiction:

A United States court having jurisdiction over the Indian Territory was established by the act of March 31, 1889, chapter 23 (25 Stat., 783). In section 5 of said act it was provided that the court "hereby established shall have exclusive original jurisdiction over all offenses against the laws of the United States,

committed within the Indian Territory, as in this act defined, not punishable by death or by imprisonment at hard labor."

By section 17 it was provided that the Chickasaw Nation and that part of the Choctaw Nation the boundaries of which were specifically set forth therein, should, from and after the passage of the act, be annexed to and become a part of the Eastern Judicial District of Texas for judicial purposes; and,

By section 18, it was provided that certain counties of Texas and the territory of the Indian nations described in section 17 should constitute a division of the Eastern Judicial District of Texas; and that a term of the circuit and district courts for said district should be held twice in each year at the city of Paris, and that the "United States courts herein provided to be held at Paris shall have exclusive original jurisdiction of all offenses committed against the laws of the United States within the limits of that portion of the Indian Territory attached to the Eastern Judicial District of the State of Texas by the provisions of this act, of which jurisdiction is not given by this act to the court herein established in the Indian Territory."

By the act of March 1, 1895, ch. 145 (28 Stat., 693), three judicial districts were created in the Indian Territory, and by the seventh section of that act it was provided that all prosecutions for crimes and offenses of which the United States court in the Indian Territory had jurisdiction should be had within the district in which said offenses were committed.

By section 9 it was provided that the United States court for the Indian Territory should have exclusive original jurisdiction of all offenses committed in said Territory of which the United States court in the Indian Territory then had jurisdiction, and after the first day of September, 1896, should have exclusive original jurisdiction of all offenses against the laws of the United States committed in said Territory, except such cases as the United States courts at Paris, Tex., Fort Smith, Ark., and Fort Scott, Kans., should have acquired jurisdiction of before that time; and that—

> all laws heretofore conferring jurisdiction upon United States courts held in Arkansas, Kansas, and Texas, outside of the limits of the Indian Territory, as defined by law, as to offenses committed in said Indian Territory, as herein provided, are hereby repealed, to take effect on September first, eighteen hundred and ninety-six; and the jurisdiction now conferred by law upon said courts is hereby given from and after the date aforesaid to the United States court in the Indian Territory: *Provided*, That in all criminal cases where said courts outside of the Indian Territory shall have, on September first, eighteen hundred and ninety-six, acquired jurisdiction, they shall retain jurisdiction to try and finally dispose of such cases. Every case, civil or criminal, pending in the United States court in the Indian Territory shall be tried and disposed of by the court where the same is pending, unless the venue therein be changed, as herein provided.

By section 29 of the act of June 28, 1898, ch. 517 (30 Stat., 511), in which the agreement between the Commission to the Five Civilized Tribes and the Choctaw and Chickasaw nations was ratified by Congress, it was provided:

> That the United States courts now existing, or that may hereafter be created, in the Indian Territory shall have exclusive jurisdiction * * * of all persons charged with homicide * * * hereafter committed in the territory of said tribes, without reference to race or citizenship of the person or persons charged with such crime; and any citizen or officer of the Choctaw or Chickasaw nations charged with such crime shall be tried, and, if convicted, punished as though he were a citizen or officer of the United States.
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> * * * * *
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> *Provided, That whenever a member of the Choctaw and Chickasaw nations is indicted for homicide, he may, within thirty days after such indictment and his arrest thereon, and before the same is reached for trial, file with the clerk of the court in which he is indicted his affidavit that he can not get a fair trial in said court; and it thereupon shall be the duty of the judge of said court to order a change of venue in such case to the United States district court for the western district of Arkansas, at Fort Smith, Arkansas, or to the United States District Court for the Eastern District of Texas, at Paris, Texas, always selecting the court that in his judgment is nearest or most convenient to the place where the crime charged in the indictment is supposed to*

have been committed, which courts shall have jurisdiction to try the case.

With the law in this condition, the act of June 16, 1906, ch. 3335 (34 Stat., 267), enabling the people of Oklahoma and Indian Territory to frame a constitution and state government and be admitted into the Union, etc., was enacted, and the provisions therein relating to prosecutions for offenses theretofore committed, but for which no indictments had been found, and the disposition of criminal cases pending in the courts of said Territories, as subsequently amended by the act of March 4, 1907, ch. 2911 (34 Stat., 1287), read as follows:

> That all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted shall be cognizable within the district in which committed, and all prosecutions for crimes or offenses committed before the passage of this act in which indictments have not yet been found or proceedings instituted shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed. (34 Stat., 275.)
>
> Prosecutions for all crimes and offenses committed within the Territory of Oklahoma or in the Indian Territory, pending in the district courts of the Territory of Oklahoma or in the United States courts in the Indian Territory upon the admission of such Territories as a State, which, had they been committed within a State, would have been cognizable in the federal courts, shall be transferred to and

be proceeded with in the United States circuit or district court established by this act for the district in which the offenses were committed, in the same manner and with the same effect as if they had been committed within a State. Prosecutions for all such offenses committed within either of said Territories and pending in the supreme court of the Territory of Oklahoma, or in the United States court of appeals in the Indian Territory, upon the admission of such Territories as a State shall be transferred to the United States circuit courts created by this act for the district within which the offense was committed, which courts are hereby vested with the same jurisdiction to hear such cases as is now vested in the appellate courts of such Territories. Upon the affirmance or reversal by the circuit court of a judgment in any such case, like proceedings shall be had and like appeals and writs of error allowed as is provided in this section of this act in civil cases.

That all causes, proceedings, and matters, civil or criminal, pending in the supreme court of the Territory of Oklahoma, or in the United States court of appeals in the Indian Territory, not transferred to the United States circuit or district courts in said State of Oklahoma, shall be proceeded with, held, and determined by the supreme court or other final appellate court of such State as the successor of said supreme court of the Territory of Oklahoma and of the United States court of appeals in the Indian Territory, subject to the same right to review upon appeal or writ of error to the Su-

preme Court of the United States now allowed from the supreme or final appellate court of a State under existing laws.

That all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma Territory, or in the United States courts in the Indian Territory, at the time said Territories become a State, not transferred to the United States circuit or district courts of the State of Oklahoma, shall be proceeded with, held, and determined by the courts of said State, the successors of said district courts of the Territory of Oklahoma, and the United States courts in the Indian Territory, with the right to prosecute appeals or writs of error to the supreme or appellate court of said State, and also with the same right to prosecute appeals or writs of error from the final determination in such cases made by the supreme or appellate court of such State to the Supreme Court of the United States, as is provided by law for appeals and writs of error from the supreme or final appellate court of a State to the Supreme Court of the United States. All criminal cases pending in the United States courts in the Indian Territory, not transferred to the United States circuit or district courts in the State of Oklahoma, shall be prosecuted to a final determination in the State courts of Oklahoma under the laws now in force in that Territory. (34 Stat., 1287.)

The provisions of this act were accepted by the constitutional convention of the State of Oklahoma on April 22, 1907.

2. *The admission of Oklahoma into the Union as a State did not abrogate the offense which plaintiff in error had committed, nor did it deprive the proper court of the power to proceed with the prosecution to a final judgment.*

It is apparent that it was the intention of Congress to preserve every offense that had theretofore been committed, and also every criminal proceeding which had been instituted. Whether the class of cases to which this belongs was not specifically mentioned purposely or by oversight it does not appear. But, as it was omitted, it must be controlled, to some extent at least, by general principles, keeping in mind, however, the intent of Congress as manifested by the various provisions of the enabling acts.

The general rule with reference to the effect upon an offense by the repeal of the law creating it before final judgment against the accused is thus stated in Bishop Stat. Crimes, section 177:

> It follows, therefore, that no proceedings can be carried on under a law which, being repealed, is not existing to give authority to the court. Consequently, if the common or statutory law, which authorizes a prosecution and conviction for a specific offense, is repealed or expired before final judgment, the court can go no further with the case. Even if a verdict has been rendered against the prisoner, sentence can not be pronounced, and he must be discharged. The same result follows if there is a judgment which has been vacated by an appeal or a writ of review.

> But, after final judgment, the execution of the sentence is not affected by a repeal of the law. This principle being general applies, of course, to *qui tam* and other actions under penal statutes and the like, as well as to indictments. If the repealing statute, though enacted, has not gone into operation, it produces no effect whatever in any case.

This rule, however, does not here apply, for two reasons:

(*a*) The statute creating the offense committed by plaintiff in error was not repealed by the admission of the State of Oklahoma, which embraced the territory wherein this crime was committed.

As above shown, this indictment is founded upon section 5339, Revised Statutes, as the place where the offense was committed, was, at the time when it was committed, under the exclusive jurisdiction of the United States. But while the enabling act, which authorized the creation of this Territory into a State and the acceptance of its terms, and the subsequent organization of the State withdrew this place from the exclusive jurisdiction of the United States, yet said section 5339 was not repealed thereby. It was just as efficacious after the creation of the State of Oklahoma in all places where the United States exercised exclusive jurisdiction, and as to all offenses which had theretofore been committed in violation thereof, as it was before. The reason why no punishment can be inflicted for an offense after the repeal of the statute creating such offense, and before final

judgment, is that after the repeal no law exists for the judgment to rest upon; that is, every element of the statute is abrogated, the part which fixes the penalty and authorizes its infliction as well as the part which creates and defines the offense, and the court is, therefore, stripped of all power to pronounce sentence. But, such is not the case where the statute remains unrepealed, although the territory where the offense was committed may be withdrawn from the operation of the statute. The offense still exists, and the penalty provided for the offense remains in full force and effect, and the courts are, therefore, not deprived of the power to impose the penalty.

A case decided at the present term of this court may be used as an illustration. In *James H. Holt* v. *United States* (No. 231) Holt was indicted for the murder of one Johnson in the reservation of Fort Worden, State of Washington, and the jury returned a verdict of guilty without capital punishment, the same as in the present case. Suppose, after this offense had been committed by Holt and before trial in the lower court, Congress had abolished this reservation and had transferred Fort Worden to the jurisdiction of the State of Washington, could it be insisted with any reason that by so doing it pardoned or abolished the crime which had theretofore been committed? Clearly, the offense would not have been affected in the least by such action, and the court having jurisdiction would have had the same authority to proceed to final judgment as it did with Fort Worden remaining still a military reservation.

The correct principle applicable to this case is thus stated by District Judge Marshall in *United States* v. *Baum* (74 Fed., 43, 46), quoting from Brown Jur., 224:

> The United States "has jurisdiction of all offenses which assails its rights, or the rights of its subjects, without regard to the place where the offender was at the time the offense was committed. The real theory of jurisdiction rests on the ground that the act or omission was against the sovereignty. The rule should be that we will punish all who offend against our sovereignty, if we can obtain control of the offender, without any regard to his nationality, or the place of the offense; and in this view alone rests true national protection.

In the present case, plaintiff in error, in taking the life of Voss, committed a crime against the United States, and the United States has not by any act of Congress signified any intention to modify its rule of law with reference to such crime, and the offense and the statutory provision for its punishment remain the same as they were when the murder was committed; and some court must, therefore, be vested with the power to inflict the punishment.

In *Stevens* v. *Diamond* (6 N. H., 330) it was held that a penalty incurred under a by-law of a town prohibiting horses from going at large in the highways of the town during certain seasons of the year might be enforced after the expiration of the year, the court drawing a distinction between an offense which

had been repealed by a subsequent act and an offense created by statute which expired at a certain time by its own limitation, holding that in the latter case the expiration of the act did not destroy the power to enforce the penalty for an offense committed while it was in force.

To the same effect see Bishop Stat. Crimes, section 182.

There is certainly greater reason for holding that where the act creating the offense has not been repealed, but the *locus* where the offense was committed has been merely withdrawn from the operation of the act, the court having jurisdiction is not deprived of the power to proceed therein to final judgment.

(*b*) If the creation of Oklahoma into a State had the effect of repealing section 5339, under which this indictment was drawn, in so far as it applied to the territory embraced within said State, yet this offense was kept alive by section 13, Revised Statutes, which reads as follows:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

In *United States* v. *Reisinger* (128 U. S., 398), it was held that the words "penalty, liability, and

forfeiture," as used in said section 13, are synonymous with the word "punishment," in connection with crimes of the highest grade, and apply to offenses against the act of June 20, 1878 (20 Stat., 243), chapter 367, relating to claim agents and attorneys in pension cases.

3. *The United States District Court at Paris, Tex., was the only court which, after the creation of the State of Oklahoma, had jurisdiction to try this case.*

When the order of removal was entered by the court at Pauls Valley, Ind. T., that court lost all jurisdiction over the case, and thereafter jurisdiction was vested solely in the United States District Court at Paris, Tex. The case was then in the same condition as if the offense had been committed within the bounds of the Eastern Judicial District of Texas, and the indictment had been found in that district.

Certainly the enabling act could not have the effect of divesting this court of jurisdiction thereover, and vesting it elsewhere, unless its intent to do so was expressed in positive terms, or the implication was so clear that it could not be doubted. But no such intent is expressed, nor is there any warrant for its implication.

By section 16, as amended by the act of March 4, 1907, it was provided that prosecutions for all crimes and offenses committed within the Territory of Oklahoma and the Indian Territory, *pending in the district courts of the Territory of Oklahoma or in the United States courts in the Indian Territory*, upon the admission of such Territories as a State, which, had they

been committed within a State, would have been cognizable in the federal courts, "shall be transferred to and proceeded with in the United States circuit or district court established by this act," etc.—and by section 20 it was provided that all causes, proceedings, and matters, civil or criminal, pending in the above-mentioned courts at the time said Territories should become a State, "not transferred to the United States circuit or district courts in said State of Oklahoma, shall be proceeded with, held, and determined by the supreme court or other final appellate court of such State as the successor of said supreme court of the Territory of Oklahoma and of the United States court of appeals in the Indian Territory," etc.

That is, the act, by its terms, is expressly restricted to cases *pending at the time of the admission of such Territories as a State, in the district court of the Territory of Oklahoma or in the United States courts in the Indian Territory*, and there is no clause or phrase in the act which contains any suggestion that a case pending at that time in any other court than those expressly mentioned was to be transferred under its provisions.

There is nothing in the act to indicate whether or not the omission of cases which had been transferred to either the United States district court at Paris, Tex., or to the district court at Fort Smith, Ark., under the proviso in section 29 of the act of June 28, 1898, was an oversight or intentional. However, it could very well have been intentional, as the reason

for allowing the removal of a case at the instance of a citizen of the Choctaw or Chickasaw nations was to enable such citizens to avoid local prejudice, and the prejudice in such case still remained after the admission of the Territories into the Union as a State.

But, if the omission was the result of oversight, the effect is the same. On February 22, 1848, Congress passed an act to regulate the exercise of the appellate jurisdiction of the Supreme Court in certain cases and for other purposes, which provided, among other things, that its provisions should apply to all cases which might be pending in the supreme or other superior courts for any territory of the United States which might thereafter be admitted as a State into the Union, at the time of its admission, and all cases in which judgments or decrees should be rendered in such supreme or superior courts at the time of such admission and not previously removed by writ of error or appeal. It was held in *McNulty* v. *Batty* (10 How., 71, 79, 80) that the act did not apply to cases which had, before the admission of the Territory as a State, been appealed to the Supreme Court of the United States, the court saying:

> The section was drawn, doubtless, under the supposition that if the suit was pending here at the time of the admission of a Territory into the Union as a State, on appeal or writ of error, no legislation was necessary to preserve it or give effect to the jurisdiction of the court over it; an opinion, as we have seen, founded in error.

Certainly an omission growing out of oversight can not be cured by judicial interpretation any more than one resulting from a mistake of law.

4. *Review of authorities cited by plaintiff in error.*

In support of his contention that the United States District Court at Paris, Tex., was by the enabling act and the creation of Oklahoma into a State deprived of jurisdiction of this case, counsel for plaintiff in error, on pages 19, 20, and 21 of his brief, cites many authorities, but they do not contradict the position here taken. The following are the most important cases cited from the decisions of this court:

In *United States* v. *Boisdore's Heirs* (49 U. S., 113, 120) the facts were, that in 1884 Congress passed an act which enabled claimants to land in the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims, and allowed an appeal from the district court to the Supreme Court of the United States within one year from the rendition of a judgment or decree; and further provided that any claim which should not be brought by petition before the district courts within two years from the passage of the act, or which, after being brought before said courts, should, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, should be barred.

In 1884 Congress passed an act which provided that so much of the expired act of May 25, 1824, as related to the State of Missouri, be revived, reenacted, and continued in force for the term of five years and no longer, and extended its provisions to other

States. The court held that where a judgment had been rendered in the district court, and an appeal taken therefrom to the Supreme Court within the time designated, the expiration of the statute as to cases pending in the district courts did not deprive the Supreme Court of jurisdiction to hear the case upon appeal. The principal ground of the court's decision was that while a certain period of time was fixed for the institution of suits and their prosecution in the district court, yet the law itself did not expire, but still remained in existence, and that consequently the Supreme Court had authority to act thereunder.

This authority is in accord with the Government's contention in this case, that as the creation of Oklahoma into a State did not repeal the statute upon which the indictment against plaintiff in error was founded, the court having cognizance of the case was not deprived of jurisdiction to try the same and pronounce judgment therein.

In *McNulty* v. *Batty* (10 How., 71) suit had been commenced by writ of attachment in the Territory of Wisconsin in 1845, and the property was attached therein. Subsequently, defendants having pleaded, judgment was rendered in their favor. The case was then removed to the Supreme Court of the Territory, and on July 31, 1847, the judgment of the lower court was there affirmed, and an appeal was taken therefrom to this court, the date of the citation being November 20, 1847. Wisconsin was admitted into the Union as a State on May 29, 1848. The act under which the State was admitted made provision for the

transfer of all *federal* cases pending in the courts at the termination of the territorial government to the federal courts, but no provision was made for the other class of cases to which the one in question belonged, which, it was held, left it for the state authorities to pass laws regulating their transfer. The court also held that by the admission of Wisconsin to the Union the territorial government ceased to exist and all authority under it, including the laws organizing its courts of justice and providing for a revision of their judgments in this court by appeals or writs of error. A further ground upon which the decision dismissing the appeal was based was, that after the termination of the territorial government there was no court in existence to which the mandate of this court could be sent to carry into effect its judgment, and the power of the court would therefore be incomplete and ineffectual were it to consent to a review of the case, and that the result would have been the same had the case been transferred to a federal court, as it was one not of federal jurisdiction, and if the judgment were affirmed or reversed and sent down to that court, it would possess no power to carry the mandate into execution.

That case was wholly unlike the present one. Here the offense for which plaintiff in error was indicted was one against the United States, and one over which, except by positive legislation to the contrary, the United States courts alone possessed jurisdiction, and the court in which the case was pending was not abolished by the admission of Oklahoma as a State,

and it had ample power to carry its judgment of imprisonment into effect. In fact, inasmuch as the offense was against the United States, except by consent of the state authorities, Congress could not have vested in the state courts the power to punish plaintiff in error for the same.

In *Norris* v. *Crocker* (13 How., 429), it was held that where an act authorizing the recovery of a penalty was repealed after action begun, but before judgment, the repeal of the statute deprived the court of jurisdiction over the subject-matter, and the action was barred thereby.

In *Ins. Co.* v. *Richie* (5 Wall., 541), it was held that where suits were brought in a federal court under an act which authorized suits involving internal revenue to be brought in such courts in actions between citizens of the same State, and the act was repealed, all such suits which were pending at the passage of the repealing act fell.

In *Ex parte McCardle* (7 Wall., 506) it was held that where a habeas corpus case had been appealed to this court under a certain statutory provision authorizing such an appeal, which provision was, during the pendency of the case here, repealed, the court could not pronounce judgment in the case, as it no longer had jurisdiction over the appeal.

United States v. *Tynen* (11 Wall., 88) was an indictment for unlawfully using a forged and counterfeited certificate of citizenship, under an act regulating seamen on board of public and private vessels

of the United States. While the indictment was pending another act was passed which, by implication, repealed the provisions of the former act. The court held that:

> By the repeal of the thirteenth section of the act of 1813 all criminal proceedings taken under it fell. There can be no legal conviction nor any valid judgment pronounced upon conviction unless the law creating the offense be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed (p. 95).

In *Railway Co.* v. *Grant* (98 U. S., 398) a judgment for $2,250 had been procured by Grant, and an appeal was taken therefrom to this court under an act which authorized an appeal from judgments of the value of $1,000 and upward. Before this court had passed thereon, this provision of the statute was repealed by the passage of an act authorizing an appeal from judgments of the value of $2,500 and upward. This court held that after the passage of this act it had no further jurisdiction over the case.

In *South Carolina* v. *Gaillard* (101 U. S., 433) it was held that the act of the general assembly of South Carolina, passed June 29, 1877, entitled "An act to provide the mode of proving bills of the bank of the State tendered for taxes, and the rules of evidence applicable thereto," created no new contract between the State and the taxpayer or bill holder, but merely provided a new remedy which

formed no part of the contract created by the charter of the bank; and that after that act was repealed, a party could not institute a proceeding to avail himself of the remedy which it furnished, and all suits then pending thereunder terminated, there being no saving clause as to them.

None of these cases have any material bearing upon the question here presented, and the other federal and state cases cited are of the same nature. In fact, the propositions asserted by counsel that "When the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction, and causes pending at the time fall, unless saved by provision of the statute;" and that "If a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the appeal finds them," do not apply to this case.

It is true that the special provision of section 29 of the act of June 28, 1898, which authorized the removal of causes at the instance of a member of the Choctaw or Chickasaw nations to the United States district court at Paris, Tex., was repealed by the admission of Oklahoma as a State, as to all cases that should thereafter arise. But, in so far as it was applicable *to the present case*, it was not repealed. The above-quoted sections of the enabling act clearly show that *it was the purpose of Congress to preserve every case which had theretofore been brought, regardless of where it was pending;* and, moreover, as there was no express repeal of the former act, it was repealed

only to the extent that the laws creating Oklahoma into a State were in conflict with its provisions. As has been seen, the enabling act made no provision whatever for cases which had previously been removed under the proviso of the act of 1898, and consequently, there being no conflict as to them, said proviso to that extent remained in full force and effect, and the cases removed thereunder had to proceed to final judgment in the court where found.

Furthermore, if it were entirely repealed, as above shown, this case would be saved by section 13, Revised Statutes.

But under no circumstances can the principles stated have any application to a case of this character. There is a material difference between the effect upon pending cases of the repeal of an act which creates an offense, or of an act which authorizes appeals, and the repeal of an act authorizing a change of venue, after the venue has been changed. When an act creating a criminal offense is repealed, as heretofore said, there is no further authority for the court to impose a penalty for such offense, and the act partakes of the nature of a pardon for all past offenses. When a case is pending in an appellate court, and the right of appeal in such cases is taken away, the effect is to place the case on precisely the same plane as cases then pending or thereafter to be brought in the lower court, and the act has the effect of affirming the judgment of the court below. In such cases the legislative intent is manifest, though not expressed in positive language; but where

a case has been removed under an existing statute, from one jurisdiction to another, and the act authorizing its removal is subsequently repealed, without special reference to what disposition shall be made of such class of cases, such case can not be affected by the repeal. As the offense still remains in existence, it can not be inferred that no further prosecution therefore shall be had, and the case must proceed in some court; and as the court wherein it is pending is one properly organized to try such cases, in the absence of an expressed intent to the contrary, it must be inferred that such court is to retain control thereof until it is finally determined. In short, the principles relied upon apply when the repealing act destroys the offense, or abrogates a remedy by which alone relief can be obtained, and not where the remedy repealed is a mere incident or step in the proceeding which was not essential to the prosecution of the case to a final judgment, but merely changes the status of the case.

5. *The order entered by the United States court at Pauls Valley, Ind. T., directing a change of venue from that court to the United States court at Paris, Tex., is valid, and vested jurisdiction in the latter court to hear the case.*

The jurisdiction of the United States district court at Paris, Tex., must depend upon the validity of the order directing a change of venue. It is unnecessary to indulge in any presumption with reference to the jurisdiction of that court, because if the order of the court at Pauls Valley was valid, jurisdiction imme-

diately vested in the Paris court, and it was its duty to proceed with the case. The objection suggested rather than argued in brief for plaintiff in error is, that the order does not recite the jurisdictional facts, and that they are not made to sufficiently appear elsewhere in the record, and it is concluded therefore that the order is void.

This conclusion is erroneous.

The proviso of the statute under which the order was made required that three facts appear to justify a removal; first, that the party accused of the homicide be a member of the Choctaw or Chickasaw Nation; second, that he file with the clerk of the court his affidavit that he could not get a fair trial in that court; and, third, that the application be made within thirty days after the finding of the indictment and arrest of plaintiff in error thereon. When the affidavit was filed, the other conditions existing, it became the imperative duty of the judge to order a change of venue to either the United States district court at Paris, Tex., or at Fort Smith, Ark., it being his duty to determine which was the most convenient to the place where the crime charged was supposed to have been committed. It is true that the order in question does not recite in positive terms either that plaintiff in error is a member of the Choctaw or Chickasaw Nation, or that the required affidavit was filed; nor is there any recital in the indictment or elsewhere in the record that plaintiff in error was a member of either of said nations, nor does the record contain any copy of

the affidavit required by the statute; but the order, when taken with what does appear elsewhere in the record, and especially when viewed in the light of the decisions of this court with reference to what shall be taken as presumed as to the validity of proceedings in United States courts, is entirely sufficient and can not be here attacked.

The indictment was filed in the court at Pauls Valley, Ind. T., on May 28, 1906, and the certificate of the clerk recites that a certified copy of the same was delivered to Hendrix, who was then in the United States jail at Pauls Valley, on May 29, 1906; and while the date of the order changing the venue does not appear in that part of the record which was sent to this court, yet the certified copy of the indictment and the copy of the orders of record at Pauls Valley were filed in the United States court at Paris, Tex., on June 3, 1906, or eight days after the indictment had been found. Consequently, the statutory requirement that the motion for change of venue should be made within thirty days after the finding of the indictment, and the arrest of the defendant thereon, was strictly complied with. (Rec., p. 8.)

The record conclusively shows that plaintiff in error was in the custody of the court, because, as stated, a copy of the indictment was served upon him in jail at Pauls Valley, and this order recites that the motion for change of venue was made by him in person; and a subsequent order made in the court at Pauls Valley shows that he entered a

motion to be released from custody on bail, which was denied by the court. (Rec., p. 7.)

Furthermore, the affidavit of R. McMillan, one of plaintiff in error's attorneys of record, which was filed in support of his motion that the case be transferred to Garvin County, Okla., shows that it was upon his advice that the venue was changed, it being done on account of the supposed partiality of the presiding judge (Rec., p. 9); and there is no suggestion in this affidavit that the affidavit required by the statute was not presented to the court at Pauls Valley, nor is there any intimation therein that any jurisdictional fact did not exist at the time the order was made, or that the court in any respect exceeded his jurisdiction in making the order; or that it was for any reason invalid or erroneous at the time it was entered.

Moreover, in the motion itself there is no suggestion that the order by which the case had been transferred to the court at Paris, Tex., from Pauls Valley, Ind. T., was invalid, or in any respect defective; the sole ground for the motion being the supposed effect of the provisions heretofore considered of the enabling act under which Oklahoma became a State. (Rec., pp. 8 and 9, 21 and 22.) No suggestion of irregularity in the order, or that it was unauthorized, was made in the motion for a new trial, nor is such ground stated and relied upon in the assignment of errors.

There being no exception taken by plaintiff in error at the time the order of removal was made, and the proceeding upon which the order was based not having been preserved by a bill of exceptions, the order is not

before this court on appeal, but any attack now made thereon is purely collateral; and the United States insists that it is not open to such attack for the following reasons:

(*a*) *The United States court at Pauls Valley, Ind. T., had jurisdiction of both the subject-matter and of the person of William Hendrix, and the record failing to show that the facts justifying the removal, or either of them, existed, the order must be presumed to be valid.*

It is unnecessary to review the almost innumerable decisions of the several courts of last resort with reference to the question of presumption of the regularity of proceedings in courts of general jurisdiction, and also in courts of special and limited jurisdiction, between many of which there is irreconcilable conflict, because this court has clearly defined the rule with reference thereto by which it is governed.

In *Ex parte Watkins* (3 Pet., 193) Watkins sued out a writ of habeas corpus, insisting that he was illegally confined in jail in the District of Columbia under a void judgment, the judgment being void because, he contended, he had committed no offense under the laws of that jurisdiction. The court discharged the writ, holding that the judgment of the trial court was conclusive, and not subject to collateral attack, saying among other things:

> Had any offense against the laws of the United States been, in fact, committed the Circuit Court for the District of Columbia could take cognizance of it. The question whether any offense was or was not committed—that

is, whether the indictment did or did not show that an offense had been committed—was a question which that court was competent to decide. If its judgment was erroneous, a point which this court does not determine, still it is a judgment, and, until reversed, can not be disregarded (p. 206).

The cases are numerous which decide that the judgment of a court of record having general jurisdiction of the subject, although erroneous, are binding until reversed. It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world, and that this apparent want of jurisdiction can avail the party only on a writ of error. This acknowledged principle seems to us to settle the question now before the court. The judgment of the Circuit Court in a criminal case is of itself evidence of its own legality and requires for its support no inspection of the indictment on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. We can not usurp that power by the instrumentality of the writ of habeas corpus. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied.

Voorhees v. *United States Bank* (10 Pet., 449, 472) involved the validity of a sale of land made under the foreign attachment laws of Ohio, the sale being collaterally attacked in an ejectment pro-

ceeding. The laws under which the Ohio court proceeded were purely statutory, and although many jurisdictional facts were not made to appear in the record, yet the proceedings were held to be valid on the ground that the judgments of courts of general jurisdiction are presumed to be valid, unless the contrary is made to appear, the court upon this question saying:

> The several courts of common pleas of Ohio, at the time of these proceedings, were courts of general civil jurisdiction, to which was added, by the act of 1805, power to issue writs of attachments, and order a sale of the property attached, on certain conditions; no objections, therefore, can be made to their jurisdiction over the case, the cause of action, or the property attached. The process which they adopted was the same as prescribed by the law; they ordered a sale, which was executed, and on the return thereof gave it their confirmation. This was the judgment of a court of competent jurisdiction on all the acts preceding the sale, affirming their validity in the same manner as their judgment had affirmed the existence of a debt. There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears; and this rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated

> becomes a part of their record, which thenceforth proves itself without referring to the evidence on which it has been adjudged.

Grignon v. *Astor* (2 How., 318, 319, 338) involved the validity of a sale of land under proceedings authorized by statute in the State of Michigan, and the court, after a review of the authorities with reference to the presumption of the validity of court proceedings, held the sale valid. In defining what constituted jurisdiction the court said (p. 338):

> The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action. (Quoting from 6 Pet., 709.)

And, again:

> If the law confers the power to render a judgment or decree, then the court has jurisdiction, what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it. (Quoting from 12 Pet., 718.)

And in defining the distinction between courts of general jurisdiction and those of limited and special jurisdiction the court said (p. 341):

> These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction; they are not inferior courts in the technical sense of the term, because an appeal lies from their decisions. That applies to "courts of

special and limited jurisdiction, which are created on such principles that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction;" that of the courts of the United States is limited and special, and their proceedings are reversible on error, but are not nullities which may be entirely disregarded. (3 Pet., 205.) They have power to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless revised on error or by appeal. The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court and those whose proceedings are nullities if their jurisdiction does not appear on their face is this: A court which is competent by its constitution to decide on its own jurisdiction and to exercise it to a final judgment without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings or they are nullities.

Harvey v. *Tyler* (2 Wall., 328, 342) was a case involving the validity of the sale of land under certain statutes of the State of Virginia, and upon the question of presumption of the judgment of a court acting under authority of special statutes the court said:

> The jurisdiction which is now exercised by the common-law courts in this country is, in a very large proportion, dependent upon special statutes conferring it. Many of these statutes create, for the first time, the rights which the court is called upon to enforce, and many of them prescribe with minuteness the mode in which those rights are to be pursued in the courts. Many of the powers thus granted to the court are not only at variance with the common law but often in derogation of that law.
>
> In all cases where the new powers thus conferred are to be brought into action in the usual form of common law or chancery proceedings we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made as in cases falling more strictly within the usual powers of the court. On the other hand, powers may be conferred on the court and duties required of it, to be exercised in a special and often summary manner, in which the order or judgment of the court can only be supported by a record which shows that it had jurisdiction of the case. The line between these two classes of cases may not be very well defined nor easily ascertained at all times. There is, however, one principle

> underlying all these various classes of cases, which may be relied on to carry us through them all when we can be sure of its application. *It is that whenever it appears that a court possessing judicial powers has rightfully obtained jurisdiction of a case all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error or set aside by some direct proceeding for that purpose.* The only difficluty in applying the rule is to ascertain the question of jurisdiction.

Applegate v. *Lexington, &c., Mining Co.* (117 U. S., 255, 270), involved the title to land under court proceedings in the State of Kentucky. After a review of the authorities upon this question, the court thus stated its conclusion:

> The result of the authorities and what we decide is, that where a court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted service, nonresident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid.

By these authorities it is well settled that, where special power is conferred by statute upon a court

of general jurisdiction, the same rule of presumption exists with reference to the regularity of proceedings under such power as exists as to all other proceedings of such court, the two prerequisites necessary to create the presumption of regularity being, first, that the court have jurisdiction of the subject-matter, and, second, that it have jurisdiction of the person. No other rule in fact could be applied to the United States courts, because they are not only created by statute, but their jurisdiction and method of procedure are defined by statute.

As above shown, no doubt can exist in the present case as to either of these prerequisites. The United States courts in the Indian Territory were expressly given power to transfer a case of homicide when the accused was a member of the Choctaw or Chickasaw Nation to the United States court at Paris, Tex. It was for the court to decide, when application was made for change of venue, whether the facts warranting the change existed; that is, whether the applicant was a member of the Choctaw or Chickasaw Nation and whether the proper affidavit had been filed, and the passing of the order of the court directing the transfer raises a conclusive presumption that the court made proper inquiry into these matters and found that the facts authorizing the transfer existed.

That the court did make such investigation, and that his conclusion was based upon facts presented, is clearly shown by the language of the order, wherein it is recited that the court, "*being well advised in the*

premises, doth grant said motion, and directs the clerk of this court to transmit this cause as to William Hendrix to the United States court at Paris, Tex." (Rec., p. 7.)

Counsel cites the case of *In re Johnson* (167 U. S., 120) in support of his contention that the Paris court never had jurisdiction of Hendrix's person. The facts in that case were that Johnson committed the offense of rape in the Indian Territory on July 24, 1896; on the same day a warrant was issued by the commissioner for the southern district of the Indian Territory; on the 9th of October, thereafter, he was indicted; on October 17 he was arraigned, tried, and convicted, and was sentenced to death. On July 25, the day after the offense was committed, a warrant was issued for Johnson by a commissioner for the eastern district of Texas, and was placed in the hands of the marshal for that district, who demanded of the marshal for the southern district of Indian Territory the surrender of Johnson, but same was refused. There was no United States court in session for the eastern district of Texas when the offense was committed, and none was held until after the accused had been convicted and sentenced.

Under the act of March 31, 1889, as has been heretofore shown, the United States District Court for the Eastern District of Texas had exclusive jurisdiction over capital offenses committed within the Indian Territory, but the act of March 1, 1895, provided that the United States courts in the Indian Territory should have exclusive original

jurisdiction of all offenses committed against the laws of the United States in said Territory, except such cases as the courts at Paris, Tex., Fort Smith, Ark., and Fort Scott, Kans., "*shall have acquired jurisdiction of before*" *September 1, 1896;* and the question was whether or not the United States court at Paris, Tex., had acquired jurisdiction of the case against Johnson before September 1, 1896. This court held that it had not, because it appeared that nothing had been done but to issue a warrant, which was never served, and there was nothing to show that a demand was made for the prisoner's person before the 1st of September, 1896, the court holding that jurisdiction was acquired under the statute, not by the commission of the offense, but by service of process upon the person. As stated, the record in this case shows that Hendrix was present in court when this order of removal was made, and that he was at the time in the custody of the marshal. The record further shows that he was present when the case was tried at Paris; but the effect would be the same had he escaped and his person not been in the custody of the Paris court until the case was tried, because under the terms of the statute the United States court at Pauls Valley lost jurisdiction of both the case and the person of the accused when the order of removal was entered, and it was immediately vested in the court at Paris, Tex.

(*b*) *The change of venue was made on plaintiff in error's own motion, and he can not now be heard to*

impeach its validity on the ground that the facts authorizing the transfer did not exist.

It is a well-recognized principle that when a defendant invokes certain action upon the part of the court he can not thereafter be permitted to take advantage of the condition brought about by such action. In *Ball* v. *United States* (140 U. S., 118) the facts were that three parties, Millard Ball, John Ball, and Robert Boutwell, had been indicted in the Circuit Court of the United States for the Eastern District of Texas for the murder of one Box, and on the trial Millard Ball was acquitted and John Ball and Boutwell were convicted and sentenced to death. The condemned brought the case to this court, and it was held that the indictment was fatally defective, and the judgment was reversed and the case remanded with direction to quash the same. All three were again indicted, and Millard Ball filed a plea of former jeopardy and acquittal, and John Ball and Boutwell filed a plea of former jeopardy by reason of their former trial and conviction. Both pleas were overruled, and all three defendants pleaded not guilty, and were convicted and sentenced to death. This court reversed the case as to Millard Ball, holding that his plea of former jeopardy was good, but affirmed the sentence as to John Ball and Boutwell on the ground that they had invoked the action of this court upon the judgment of the court below, and therefore could not take advantage of a jeopardy which had been annulled at their own instance.

Murphy v. *Massachusetts* (177 U. S., 155) also illustrates this rule. Murphy was tried in the state court of Massachusetts on a charge of embezzlement, was convicted and sentenced to imprisonment for a term, one day of which was to be in solitary confinement and the rest at hard labor. He remained in confinement for nearly three years and then sued out a writ of error, and the judgment was reversed on the ground that the sentence was unconstitutional. The case was remanded to the court below for resentence. Before imposing the new sentence the court said that as the prisoner had already suffered one term of solitary confinement the court would not impose another if a written waiver by the prisoner of the provision therefor were filed. He declined to file such a waiver and the sentence was accordingly imposed. Upon his taking steps to have the sentence annulled, it was held that inasmuch as the former sentence had been set aside at his own instance, it afforded no protection against the subsequent sentence; the court saying—

> But, however that may be, the plea of former jeopardy or of former conviction can not be maintained because of service of part of a sentence, *reversed or vacated on the prisoner's own application* (p. 162).

In *Perteet* v. *the People* (70 Ill., 171, 178) Perteet had been convicted for murder in Cook County, Ill., had taken the case to the Supreme Court by writ of error and had secured a reversal of the same. His counsel thereupon obtained a certified copy of the

opinion of the Supreme Court, and presented same to the lower court, and had the case redocketed. He then presented a petition for change of venue, and the court ordered that the venue be changed to Will County. He was there subsequently tried, convicted, and condemned to death. On a second appeal one ground for reversal insisted upon was, that when the change of venue was ordered, the lower court had no juridsiction over the case, in that no *remittur* had been filed from the Supreme Court. This contention was overruled, the court among other things saying:

> Instead of, and in lieu of, the *remittur*, the defendant himself, as shown by the record, filed in the criminal court a certified copy of the opinion of this court in the cause. This evidence produced to the criminal court was not the best evidence—it was not the technical evidence the law required; but, at the same time, it proved to the court each and every fact that the *remittur* would, had it been filed; *and when the defendant himself produced this evidence of the action of this court, and called into action the powers of the criminal court, which were suspended by the writ of error, does it now lie in his mouth to object that the criminal court acted on insufficient evidence? Did he not, by his own voluntary act, waive evidence of a certain fact, which he now insists is error?*

State v. *McEvoy* (68 Iowa, 355) involved the validity of a change of venue in a criminal case pending before a justice of the peace. At the instance of the

defendant the case was, upon a ground not justified by law, sent to a wrong justice. The court in considering the matter, said:

> Defendant alleged as a reason why the cause should not be sent to Justice Huff that he was a material witness, and claimed that this afforded a legal ground for sending it to another justice. He induced Justice Morrison to adopt that view, although it was erroneous, and when the cause was ordered to be sent to Justice Blood he not only consented to the order, but requested that it be made, and at no stage of the proceedings before the appeal to the district court did he make any question as to the jurisdiction of that justice to try the cause. We know of no legal ground upon which he can now be permitted to question the jurisdiction of the justice. Justice Blood had jurisdiction of the subject-matter of the action. All that can be claimed is that he did not acquire jurisdiction of the person of the defendant in the particular mode prescribed by the statute. But defendant might waive his right to be brought to trial on the charge in that particular manner, and we think he did waive it when he requested and consented that he be taken before Justice Blood for trial (p. 357).

To the same effect, see *People ex rel* v. *Court of Special Sessions, State and County of New York* (4 Hun., 441).

(*c*) It is further suggested as material that the order of removal does not recite to which of the United States courts at Paris, Tex., the case was transferred, and that the note of filing made by the

clerk at Paris does not recite of which court he was clerk.

The failure to designate in the order that the case was removed to the *district* court at Paris was immaterial, as the statute expressly directed that it was to that court alone it could be removed, and it was that court alone which was vested with jurisdiction to try the same. Furthermore, A. O. Brackett, whose deputy, J. B. Dailey, filed the transcript of the record at Paris, was clerk of the district court, and was not clerk of the Circuit Court, of which fact both the United States District Court at Paris had, and this court has, judicial knowledge. Moreover, the record shows that the case was tried in the United States District Court, and not in the Circuit Court.

(*d*) Plaintiff in error William Hendrix was in fact a Choctaw Indian, and this court will take judicial knowledge of such fact.

The records of the Department of the Interior show the following facts, as appear from a certificate from that department, which is as follows:

> DEPARTMENT OF THE INTERIOR,
> COMMISSION TO THE FIVE CIVILIZED TRIBES.
>
> Commissioners:
> TAMS BIXBY.
> THOMAS B. NEEDLES.
> C. R. BRECKINRIDGE.
> WM. O. BEALL, *Secretary.*
>
> Address only the Commission to the Five Civilized Tribes, Muskogee, Indian Territory, November 4, 1904.

The honorable the Secretary of the Interior.

SIR: The Commission to the Five Civilized Tribes has the honor to transmit herewith a schedule of citizens by intermarriage of the Choctaw Nation, numbers 1054 to 1199, inclusive, found by the commission to be entitled to enrollment and who were living on September 25, 1902, as provided by the act of Congress approved July 1, 1902, entitled "An act to ratify and confirm an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes" (32 Stat., 641), and ratified by the citizens of the Choctaw and Chickasaw nations at a special election held September 25, 1902.

Decisions enrolling the persons enumerated in this schedule have heretofore been rendered by the commission and copies thereof furnished Mansfield, McMurray & Cornish, attorneys for the Choctaw and Chickasaw nations, and also the applicants. The attorneys for the Choctaw and Chickasaw nations were advised that they would be allowed fifteen days from the date of the rendition of said decisions within which to file with the commission such protest as they desired to make against the action of the commission in enrolling the persons enumerated in such decisions and make satisfactory proof of service of protest upon the applicants enumerated therein. No protests have been offered by the attorneys for the Choctaw and Chickasaw nations to the action of the commission in enrolling the persons whose names are included in the schedule herewith transmitted, and in accordance with the provisions

of the acts of Congress approved June 28, 1898 (30 Stat., 495), and July 1, 1902 (32 Stat., 641), the persons enumerated in this schedule have been enrolled by the commission as intermarried citizens of the Choctaw Nation.

The tribal roll, if found on roll, from which the persons named in the schedule are identified, and such other data as will properly identify the persons enumerated therein, here follow in the same order as in the schedule:

* * * * *

No.	Name.	Roll county.	Remarks.
1137	Hendrix, Evelina		Wife of William Hendrix, Choctaw roll number 14447.

Respectfully submitted.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
TAMS BIXBY, *Chairman.*
T. B. NEEDLES, *Commissioner.*
C. R. BRECKINRIDGE, *Commissioner.*

Through the Commissioner of Indian Affairs.
6 inclosures.

CHOCTAW ROLL, CITIZENS BY BLOOD.

No.	Name.	Age.	Sex.	Blood.	Census card No.
14447	Hendrix, William	24	M	1/8	4616

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 11, 1903.

Approved:

THOS. RYAN,
Acting Secretary.
(L. R. S.)

* * * * *

CHOCTAW ROLL, CITIZENS BY MARRIAGE.

No.	Name.	Age.	Sex.	Blood.	Census card No.
1137	Hendrix, Evelina	22	F.	I W	4616

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Nov. 16, 1904.

Approved:

THOS. RYAN,
Acting Secretary.
(L. R. S.)

* * * * *

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, November 25, 1910.

I, C. F. Hauke, Acting Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true excerpt copy of the original as the same appears on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, on the day and year first above written.

(Signed) C. F. HAUKE,
Acting Commissioner.

[Seal of the Office of Indian Affairs.]

This must necessarily be the William Hendrix here under indictment, as the record shows that the name of plaintiff in error's wife is Evelina.

Under the statutes directing the enrollment of the Indians, records thereof must be kept in the Interior Department, and the courts will take judicial knowledge of such records. (*Knight* v. *United States Land Asso.* (142 U. S., 161, 169).

II.

The court did not err in refusing to permit Evelina Hendrix, the wife of plaintiff in error, to testify in his behalf.

Plaintiff in error relies upon section 858, Revised Statutes, wherein it is provided that in the courts of the United States no witness shall be excluded in any action on account of color, or in a civil action because he is a party to or interested in the issue of the trial * * *. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States, and in trials at common law and in equity and admiralty.

It is well settled that this section has no application to criminal trials, and that the rules of evidence in such cases, unless expressly modified by Congress, are those which existed when the judiciary act of 1789 was passed.

In *United States* v. *Reid* (12 How., 361, 366) two defendants, Reid and Clements, were jointly indicted and on the trial of Reid, Clements was offered as a witness in his behalf. The court held that Clements was not competent, though he was a competent wit-

ness under the laws of Virginia, wherein the case was tried, the court saying:

> The rules of evidence in criminal cases are the rules which were in force in the respective States when the judiciary act of 1789 was passed. Congress may certainly change it whenever they think proper within the limits prescribed by the Constitution. But no law of a State made since 1789 can affect the mode of proceedings or the rules of evidence in criminal cases.

To the same effect is *Logan* v. *United States* (144 U. S., 263, 298, 302), wherein the same rule was applied with reference to the competency of a witness who had been convicted for a felony in another State. (See also *United States* v. *Black*, 1 Hask., 570; *United States* v. *Hawthorne*, 1 Dillon, 422; *United States* v. *Brown*, 1 Sawyer, 531; *United States* v. *Hall*, 53 Fed., 352.)

The case of *Lucas* v. *Brooks* (18 Wall., 436, 453), cited by plaintiff in error, was a civil case, and has no bearing upon the present question.

III.

Plaintiff in error is not entitled to a new trial for the reasons set forth in certain affidavits which it is claimed were made by members of the jury.

There are three reasons why the judgment of the court should not be reversed on this ground:

1. These affidavits undertake to detail a misunderstanding of the jurymen as to the effect of the verdict

"Guilty, without capital punishment," when jurymen can not be permitted to impeach by affidavit their verdict upon such ground.

The rule laid down in *Mattox* v. *United States* (146 U. S., 140, 149), with reference to what affidavits of jurymen may be received by the courts, is as follows:

> On a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. *But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence* although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts and declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial.

This rule clearly excludes affidavits of the character here presented.

2. The order overruling the motion for a new trial does not recite whether the affidavits were or were not considered by the trial court. Therefore, if the affidavits were of such character that it was the duty of the court to consider them, it will be presumed that the court committed no error and considered them; and the question whether a new trial should be granted being one within the court's discretion, and he having determined that the motion should be overruled, it is not subject to review by this court.

(*Henderson* v. *Moore*, 5 Cranch, 11, 12; *Marine Ins. Co.* v. *Young*, 5 Cranch, 187, 191; *McLanahan* v. *Ins. Co.*, 1 Pet., 187; *United States* v. *Beaufort*, 3 Pet., 12, 32; *Indianapolis, etc., R. R. Co.* v. *Horst*, *Mattox* v. *United States*, 146 U. S., 140, 147.)

3. The affidavits are not made a part of the bill of exceptions, and consequently constitute no part of the record in this court.

This objection alone is conclusive, regardless of how meritorious this ground for new trial might otherwise be.

For the foregoing reasons the judgment of the United States District Court at Paris, Tex., should be affirmed.

J. A. FOWLER,
Assistant Attorney-General.

NOVEMBER, 1910.

○

Where the record is not here, and the jurisdictional facts are admitted, and the order recited that the court was well advised in the premises, this court will not hold that the court to which the case was removed on petition of plaintiff in error himself did not acquire jurisdiction because the petition did not state all the jurisdictional facts required by the statute authorizing the removal.

While the repeal of a statute giving special jurisdiction to a court may operate to deprive that court of the jurisdiction so conferred, the mere enactment of a subsequent statute which obviates future application of the earlier statute does not amount to its repeal or affect jurisdiction already acquired.

The provisions of the Oklahoma enabling act of June 16, 1906, c. 3335, 34 Stat. 267, as amended March 4, 1907, c. 2911, 34 Stat. 1287, transferring criminal cases pending in the United States courts of the Indian Territory to the courts of Oklahoma, did not repeal the act of June 28, 1898, c. 517, 30 Stat. 511, or affect cases which had already been transferred under that act to the United States District Court for the Eastern District of Texas.

In this case *held* that it was not error for the trial court to refuse to allow the wife of one accused of murder to testify. *Logan* v. *United States*, 144 U. S. 263.

There was no error on the part of the trial court in denying a motion for a new trial based on affidavits of some of the jurors that they agreed to the verdict on the understanding between themselves and other jurors that the punishment of the degree found would be less than that imposed by the court. *Mattox* v. *United States*, 146 U. S. 140.

THE facts are stated in the opinion.

Mr. James G. Dudley for plaintiff in error:

Jurisdiction in a criminal case is never presumed, but must always be shown, is never waived by a defendant, and want of jurisdiction can be attacked at any stage of a criminal proceeding or even collaterally. *In re Neilson*, 131 U. S. 176; *United States* v. *Rogers*, 23 Fed. Rep. 662; *In re Mills*, 135 U. S. 270; *In re Graham*, 138 U. S. 451.

District Courts of the United States have no jurisdiction to try capital cases, no jurisdiction to try a person indicted for murder, charged to have been committed on land, and no power or jurisdiction to sentence a person for a capital

offense so committed, either to suffer death or life imprisonment. Section 563, Rev. Stat. The Circuit Courts of the United States have exclusive jurisdiction of all capital cases. Section 629, Rev. Stat., subd. 20.

The indictment in this case charges a crime (murder) punishable by death, § 5339, Rev. Stat., and the offense is no less capital, although the jury by their verdict found defendant guilty as charged "without capital punishment." *Fitzpatrick* v. *United States*, 178 U. S. 304; *Goodshot* v. *United States*, 104 Fed. Rep. 257.

The United States court in the Indian Territory had jurisdiction until taken away by the enabling act. Jurisdiction was taken away without saving and excepting cases pending by § 20 of the enabling act, as amended by the act of March 4, 1907.

When the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction, and causes pending at the time fall, unless saved by provision of the statute. *United States* v. *Boisdore*, 8 How. 113; *Baltimore & P. R. R. Co.* v. *Grant*, 98 U. S. 398; *United States* v. *Tymen*, 11 Wall. 88; *Merchants' Ins. Co.* v. *Ritchie*, 5 Wall. 88; *McNulty* v. *Batty*, 10 How. 79; *Ex parte McCradle*, 7 Wall. 514; *Downes* v. *Bidwell*, 182 U. S. 675; *Murphy* v. *Utter*, 186 U. S. 109; *Bird* v. *United States*, 187 U. S. 124; *Colt* v. *Young*, 2 Blatchf. 473; *United States* v. *Barr*, 4 Sawy. 255; *United States* v. *Hague*, 22 Fed. Rep. 706; *United States* v. *Van Vliet*, 23 Fed. Rep. 35; *Manley* v. *Olney*, 32 Fed. Rep. 709; *Birdseye* v. *Sheffer*, 37 Fed. Rep. 825; *Aspley* v. *Murphy*, 50 Fed. Rep. 377; *Postal Tel. Cable Co.* v. *Southern R. R. Co.*, 89 Fed. Rep. 194; *Fairchild* v. *United States*, 91 Fed. Rep. 298; *Strong* v. *United States*, 93 Fed. Rep. 258; *Emblen* v. *Lincoln Land Co.*, 94 Fed. Rep. 713; 102 Fed. Rep. 562; *United States* v. *Jacobus*, 96 Fed. Rep. 262; *United States* v. *Kelley*, 97 Fed. Rep. 461; *Cincinnati Brewing Co.* v. *Betteman*, 102 Fed. Rep. 17; *McClain* v. *Williams*, 10 S. Dak. 336; *Raush* v. *Mor-*

HENDRIX *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

No. 319. Argued November 28, 29, 1910.—Decided January 3, 1911.

The United States court at a particular place named is a sufficient designation of the only court of the United States held at that place, which has jurisdiction of the case; and an order transmitting a case under the act of June 28, 1898, c. 517, 30 Stat. 511, to the United States court at Paris, Texas, is sufficient to transfer the case to the District Court of the United States for the Eastern District of Texas and to give that court jurisdiction.

rison, 47 Indiana, 416; *Atty. Genl.* v. *Wharton*, 25 La. Ann. 32; *Waimsley* v. *Nichols*, 36 La. Ann. 801; *Church* v. *Weeks*, 38 Mo. App. 579; *Olcott* v. *Maclean*, 10 Hun, 282; *State* v. *Bank of Tennessee*, 3 Baxt. 409; *Texas Mexican R. R. Co.* v. *Jarvis*, 80 Texas, 464; *S. C.*, 15 S. W. Rep. 1089.

So if an act conferring jurisdiction is repealed, without reservation as to pending cases, they fall with it. *Sherman* v. *Grinnell*, 123 U. S. 679; *National Bank* v. *Peters*, 144 U. S. 570; *Gurnee* v. *Patrick County*, 137 U. S. 141; *United States* v. *Kelley*, 97 Fed. Rep. 461; *Sims* v. *Black Dog*, 9 Oklahoma, 671.

"When the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction, and causes pending at the time fall, unless saved by provision of the statute." *United States* v. *Boisdore*, 8 How. 113; *Baltimore & P. R. R. Co.* v. *Grant*, 98 U. S. 398; *United States* v. *Tymen*, 11 Wall. 88; *Merchants' Ins. Co.* v. *Ritchie*, 5 Wall. 541; *McNulty* v. *Batty*, 10 How. 79; *Ex parte McCradle*, 7 Wall. 514; *Downes* v. *Bidwell*, 182 U. S. 248; *Gwin* v. *United States*, 184 U. S. 675; *Murphy* v. *Utter*, 186 U. S. 109; *Bird* v. *United States*, 187 U. S. 124; *Colt* v. *Young*, 2 Blatchf. 473.

If a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. *Trenholm* v. *Gillard*, 101 U. S. 433; *Tex. Mex. R. R. Co.* v. *Jarvis*, 80 Texas, 464; *Larkin* v. *Safians*, 15 Fed. Rep. 153; *Vance* v. *Rankin*, 198 Illinois, 627; *Griffis* v. *Payne*, 22 Tex. Civ. App. 522; *Burlington* v. *Burlington Traction Co.*, 70 Vermont, 495; *Dulin* v. *Lillard*, 91 Virginia, 725.

The District Court of the United States for the Eastern District of Texas, to have had jurisdiction in this case by the order transferring the same, must not only have had jurisdiction of the offense, but must have obtained jurisdiction of the person of the defendant, by some means known to the law. *In re Johnson*, 167 U. S. 124; § 858,

Rev. Stat.; *Logan* v. *United States*, 144 U. S. 263, is not conclusive. See *Lucas* v. *Brooks*, 18 Wall. 436; Art. 775, Code of Crim. Proc.; Wilson's Statutes of Okla., 1903; Crim. Proc., 1232, § 5495; Snyder's Comp. Laws of Okla., 1909; Crim. Proc., 1399, § 6834; Laws of Okla., 1895, 201; Const. of Okla., Art. 24.

Under § 729, Rev. Stat., the trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.

A law intended by Congress specially for the benefit of members of the Choctaw and Chickasaw tribes, and for their protection against prejudice, should not operate as a snare and a delusion. *Texas &c. R. R. Co.* v. *Humble*, 181 U. S. 60.

The rule that jurors cannot be permitted to impeach their verdict, *Mattox* v. *United States*, 146 U. S. 140, does not apply here.

It is clear from the affidavits filed that the jury in this case discussed the punishment, and did not intend their verdict to carry a greater punishment than that for manslaughter. Unanimity is one of the essential features of trial by jury; it was so at the common law, and is preserved and protected by constitutional guarantee. *American Pub. Co.* v. *Fisher*, 166 U. S. 464; *Springfield* v. *Thomas*, 166 U. S. 707.

Mr. Assistant Attorney General Fowler for the United States:

The United States District Court for the Eastern District of Texas had jurisdiction to try this case, and it was not error for that court to overrule plaintiff in error's motion to remove the case to the District Court of Garvin County, State of Oklahoma. Section 4, act of March 1, 1895, c. 145, 28 Stat. 693; ch. 45, Mansfield's Digest General Laws of Arkansas; § 1, act of January 15, 1897, c. 29,

29 Stat. 487; act of March 3, 1885, c. 341, § 9, 23 Stat. 385; act of June 7, 1897, c. 3, 30 Stat. 62, pt. 6; agreement between Commission to the Five Civilized Tribes and the Choctaw and Chickasaw Nations of Indians, ratified by act of June 28, 1898, c. 517, 30 Stat. 495, 511, statutes relating to jurisdiction.

A United States court having jurisdiction over the Indian Territory was established by the act of March 31, 1889, c. 23, 25 Stat. 783, §§ 5, 17, 18; act of March 1, 1895, c. 145, 28 Stat. 693; act of June 28, 1898, c. 517, 30 Stat. § 29.

The admission of Oklahoma into the Union as a State did not abrogate the offense which plaintiff in error had committed, nor did it deprive the proper court of the power to proceed with the prosecution to a final judgment.

The statute creating the offense committed by plaintiff in error was not repealed by the admission of the State of Oklahoma, which embraced the territory wherein this crime was committed. *Holt* v. *United States*, 218 U. S. 245; *United States* v. *Baum*, 74 Fed. Rep. 43, 46; *Stevens* v. *Diamond*, 6 N. H. 330; Bishop, Stat. Crimes, § 182.

If the creation of Oklahoma into a State had the effect of repealing § 5339, Rev. Stat., under which this indictment was drawn, in so far as it applied to the territory embraced within said State, yet this offense was kept alive by § 13, Rev. Stat. *United States* v. *Reisinger*, 128 U. S. 398. The United States District Court at Paris, Texas, was the only court which, after the creation of the State of Oklahoma, had jurisdiction to try this case.

The authorities cited by plaintiff in error do not contradict this position.

There being no exception taken by plaintiff in error the order is not before this court on appeal, and it is not open to such collateral attack. *Voorhees* v. *United States Bank*, 10 Pet. 449, 472; *Grignon* v. *Astor*, 2 How. 318, 319, 338; *Harvey* v. *Tyler*, 2 Wall. 328, 342; *Applegate* v. *Lexington Mining Co.*, 117 U. S. 255, 270.

The change of venue was made on plaintiff in error's own motion, and he cannot now be heard to impeach its validity on the ground that the facts authorizing the transfer did not exist. *Murphy* v. *Massachusetts*, 177 U. S. 155; *Perteet* v. *The People*, 70 Illinois, 171, 178; *State* v. *McEvoy*, 68 Iowa, 355; *People* v. *Court Special Sessions*, 4 Hun, 441.

The failure to designate in the order that the case was removed to the District Court at Paris was immaterial, as the statute expressly directed that it was to that court alone it could be removed, and it was that court alone which was vested with jurisdiction to try the same.

Under the statutes directing the enrollment of the Indians, records thereof must be kept in the Interior Department, and the courts will take judicial knowledge of such records. *Knight* v. *United States Land Asso.*, 142 U. S. 161, 169.

The court did not err in refusing to permit Evelina Hendrix, the wife of plaintiff in error, to testify in his behalf. Section 858, Rev. Stat., has no application to criminal trials; rules of evidence in such cases, unless expressly modified by Congress, are those which existed when the judiciary act of 1789 was passed. *United States* v. *Reid*, 12 How. 361, 366; *Logan* v. *United States*, 144 U. S. 263, 298; *United States* v. *Black*, 1 Hask. 570; *United States* v. *Hawthorne*, 1 Dillon, 422; *United States* v. *Brown*, 1 Sawyer, 531; *United States* v. *Hall*, 53 Fed. Rep. 352. *Lucas* v. *Brooks*, 18 Wall. 436, 453, was a civil case, and does not apply.

Plaintiff in error is not entitled to a new trial for the reasons set forth in certain affidavits which it is claimed were made by members of the jury. *Mattox* v. *United States*, 146 U. S. 140, 149.

Whether a new trial should be granted being within the court's discretion is not reviewable by this court. *Henderson* v. *Moore*, 5 Cranch, 11, 12; *Marine Ins. Co.* v.

Young, 5 Cranch, 187, 191; *McLanahan* v. *Insurance Co.*, 1 Pet. 187; *United States* v. *Beaufort*, 3 Pet. 12, 32; *Mattox* v. *United States*, 146 U. S. 140, 147.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Hendrix was indicted in the United States court in the Indian Territory for the crime of murder, for killing one Roler W. Voss. On his motion the case was transferred for trial to the United States court for the Eastern District of Texas, at Paris, Texas. The order transferring the case recited that it was made on the motion of Hendrix, "the court being well advised in the premises."

On the fourth of March, 1909, in the District Court, he objected to the jurisdiction of the court on the ground that the crime was committed in the State of Oklahoma, and "that under the act of Congress known as the 'Enabling act,' passed June 16, 1906, all criminal cases pending in the United States court within the Indian Territory were transferred to the district courts of the State of Oklahoma and of the county of said State where the alleged offense is said to have been committed."

A motion was made to send the cause to such county, to the end that the offense "be tried in the county and State where alleged to have been committed, in pursuance of the Constitution of the United States and the statutes made in pursuance thereof."

The motion was supported by the affidavit of the attorney of Hendrix, which stated that he was instrumental in having the cause removed to Paris, Texas, on account of the prejudice of the presiding judge of the Southern District of the Indian Territory, and that "under the Federal statute permitting said removal to be made, the same was done by Will Hendrix on my advice and suggestion, especially for the reason before mentioned. . . ."

The motion was denied. Hendrix was convicted and sentenced to hard labor for life in the penitentiary of the United States at Atlanta, Georgia.

A motion for a new trial was made, stating as the grounds thereof certain rulings upon evidence, and the action of the court in denying the motion to transfer the case to Garvin County, Oklahoma. And the same grounds constitute the assignments of error in this court.

Another ground is urged in the argument. It is urged that the District Court at Paris, Texas, did not have jurisdiction of the person of Hendrix because, as it is contended, the order of the court changing the venue of the case directed it to be transmitted "to the United States court at Paris, Texas," and did not designate the District Court as required by the statute. "There were district and circuit courts," it is said, "for the Eastern District of Texas, at Paris, Texas, but no court by the name of the 'United States court.'" And it is asked, "to which of these courts was this case transferred?" The question is easily answered. The statute under which the change of venue was made provides "that whenever a member of the Choctaw and Chickasaw Nations is indicted for homicide, he may, within thirty days after such indictment . . . file . . . his affidavit that he cannot get a fair trial, . . . and it thereupon shall be the duty of the judge to order a change of venue in such case to the United States district court for the Western District of Arkansas, at Fort Smith, Arkansas, or to the United States district court for the Eastern District of Texas, at Paris, Texas . . ." June 28, 1898, c. 517, 30 Stat. 511. Reading the order of the court changing the venue of the case in connection with the statute, the order is not uncertain. Besides, the record was transferred and filed in the District Court at Paris, Texas, and Hendrix was tried in that court. In other words, the case was removed to the only United States court at Paris, Texas, designated by the statute,

and tried in the only United States court there in which it could be tried.

It is further contended that such District Court had no jurisdiction of the person of Hendrix, because the order of removal did not recite "the jurisdictional facts or findings authorizing such change of venue," nor are such facts or findings shown by the record. That is, it is not shown that he was a member of the Choctaw and Chickasaw Nations. To both objections it might be immediately answered that a complete record of the case is not here. The affidavit upon which the order of removal was made is not here. It is not denied that an affidavit was filed as required by the statute, and it may be assumed that it was sufficient to justify the action of the court. It is admitted that Hendrix is an Indian and a member of the Choctaw and Chickasaw Nations. The motion for change of venue was made by him, and could only have been made by him, and the order recites that the court granted the motion, "being well advised in the premises." This means advised by Hendrix in the way provided by the statute. And it has indubitable confirmation in the affidavit of his attorney, filed in support of the motion to send the case back to Oklahoma. It stated that the motion for removal was made "under the Federal statute permitting said removal to be made."

The inference is palpable that the jurisdictional fact that Hendrix was an Indian was presented to the court and constituted its ground of action—action which, we may say, was imperatively required by the statute.

The next contention of Hendrix is that jurisdiction was taken from the District Court in Texas by § 20 of the act to enable the people of Oklahoma to form a constitution and a state government, as amended March 4, 1907. By that section it was provided that all causes, civil and criminal, pending in the United States courts of Oklahoma Territory, or in the United States courts in the Indian

Territory, at the time those Territories should become a State, not transferred to the United States Circuit Court or District Courts in the State of Oklahoma, should be proceeded with, held and determined by the courts of the State, with rights of appeal to the final appellate court of the State and to the Supreme Court of the United States. And it is provided that "all criminal cases pending in the United States courts in the Indian Territory not transferred to the United States circuit or district courts in the State of Oklahoma shall be prosecuted to a final determination in the state courts of Oklahoma under the law now in force in that Territory." March 4, 1907, Chap. 2911, 34 Stat. 1286.

The argument is that by certain acts of Congress, explained in *In re Johnson*, 167 U. S. 120, the United States courts in the Indian Territory were given jurisdiction of offences committed in the Territory against the laws of the United States, and that the laws which conferred jurisdiction on the United States courts held in Arkansas, Kansas and Texas outside of the limits of the Territory were repealed. But we have seen that by § 29 of the act of June 28, 1898, a change of venue of cases in the United States courts of the Territory could be invoked by a member of the Choctaw and Chickasaw Nations, and that under the statute the venue of the pending case was, on the motion of Hendrix, changed to the District Court at Paris, Texas. It is, however, contended that the power of the court to make the order "had been taken away and repealed by the act of Congress known as the 'Enabling act,' and the State of Oklahoma had been erected and the state courts had succeeded to the jurisdiction of the United States courts in the Indian Territory." The "Enabling act," it is urged, "makes no exception or provision saving cases pending in the United States court in the Indian Territory, nor any provision saving cases then pending in any of the United States courts" at Paris,

Texas, or in the Eastern District of Texas, on change of venue, and, therefore, the court had no jurisdiction to try Hendrix. To support the contention it is argued that when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction and causes pending at the time fall, unless saved by provision of the statute. Many cases are cited to support the proposition and other cases to sustain the view that, "if an act conferring jurisdiction is repealed, without reservation as to pending cases, they fall with it." The effect would have to be admitted if the imputed cause existed. The act of June 28, 1898, under which the change of venue was ordered, was not repealed. The conditions of its future application, of course, disappeared with the admission of the State into the Union, but what had been done before that time was not abrogated, nor was the statute repealed. It had performed its office as to the pending case, but even if we should consider it necessarily as a continuing power, not completely fulfilling its purpose by the transfer simply of a case from one court to another, we cannot regard it as having been repealed nor that jurisdiction had been taken from the District Court at Paris, Texas. The "Enabling act" provides only for the transfer of cases to the courts of Oklahoma which were pending in the District Court of the Territory of Oklahoma and in the United States courts of Indian Territory. That this case was so pending was the conception of counsel when the motion was made to transfer it to the District Court of Garvin County, Oklahoma, and the same conception is expressed in the argument. And it is necessary to meet the words of the enabling act, which embraced, as we have seen, only cases pending in the courts of Oklahoma and Indian Territories. The foundation of the conception seems to be that the venue of the case was not legally changed to the District Court at Paris, Texas, and that it was still pending in the United States court in

the Indian Territory when the enabling act was passed and was transferred by the act to the courts of the State. To this operation of the act we cannot assent. The act is explicit in its terms and provisions. It was careful in its accommodations for the new conditions—the change of the Territories into a State, and in the adjustments made necessary by the creation of new jurisdictions, state and Federal. There was no such necessity for cases transferred to other jurisdictions still adequate to dispose of them. The contention is therefore untenable.

It is assigned as error that the wife of Hendrix was not allowed to testify in his behalf to certain matters which, it is contended, were "vitally material to his defense." The ruling was not error. *Logan* v. *United States*, 144 U. S. 263.

On the motion for new trial affidavits of four jurors were offered, stating with some detail that they did not understand the legal effect of the verdict. Only one of the affidavits is in the record. The maker states that, by finding the defendant guilty, as charged in the indictment, without capital punishment, "he did not understand what the punishment would be on such a verdict, and agreed to it on the understanding that the punishment would only be two years in the penitentiary." He further states that he was in favor of a verdict for manslaughter, and would never had consented to the verdict had he thought or believed it "would carry with it a life penalty." The motion for new trial, as we have said, was denied. We see no error in the ruling. *Mattox* v. *United States*, 146 U. S. 140.

The other errors assigned are not pressed in the argument.

Judgment affirmed.

MR. JUSTICE HARLAN dissents.